THE

HISTORY

OF THE

CASES

OF

CONTROVERTED ELECTIONS,

WHICH WERE

Tried and determined during the First Session of the Fourteenth Parliament of GREAT BRITAIN.

XV GEO. III.

By SYLVESTER DOUGLAS, Esq; of LINCOLN'S-INN.

Mais si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être a un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient une opinion particuliere du juge on vivroit dans la societé sans sçavoir précisément les engagemens que l'on y contracte.

L'Esprit des Loix, liv. xi. c. 6.

IN FOUR VOLUMES.

VOL. II.

DUBLIN:

PRINTED BY J. WILLIAMS, (No. 21,) SKINNER-ROW.

M,DCC,LXXVIII.

CONTENTS.

CASE XIV.

Page

Borough of Helleſton, in the County of Cornwall, 1
Notes on that Caſe, 26

CASE XV.

Borough of Bedford, in the County of Bedford, 34
Notes on that Caſe. 62

CASE XVI.

Borough of Sudbury, in the County of Suffolk, 64
Notes on that Caſe, 87

CASE XVII.

Diſtrict of Wigtown, Whitehorn, New Galloway, and Stranraer, in Scotland, 88
Notes on that Caſe, 104

CASE XVIII.

Borough and County of the Town of Poole, 110
Notes on that Caſe, 141

CASE XIX.

Borough of Shafton, otherwiſe Shafteſbury, in the County of Dorſet, 147
Notes on that Caſe, 154

CASE XX.

Borough of Haſlemere, in the County of Surrey, 155

CASE XXI.

County of Clackmannan, in Scotland, 167
Notes on that Caſe, 175

CASE

CONTENTS.

CASE XXII.

County of Lanerk, in Scotland, 179

CASE XXIII.

Borough of St Ives, in the County of Cornwall, 190
Notes on that Case, 195
Of Bribery, 195—206

CASE XXIV.

District of North Berwick, Haddington, Lauder, Jedburgh, and Dunbar, in Scotland, 207

XIV.

THE

CASE

OF THE BOROUGH OF

HELLESTON,

IN THE COUNTY OF CORNWALL.

The Committee was chosen on Friday, the 10th of March, and consisted of the following Gentlemen.

Sir John Hynde Cotton, Bart. Chairman.	Members for	Cambridgesh.
Sir George Cornwall, Bart.		Herefordshire
George Bridges Brudenell, Esq.		Rutlandshire
Sir Matthew White Ridley, Bart.		Newcastle
Francis Page, Esq.		Oxford Univ.
William Drake, jun. Esq.		Agmondesham
Sir Francis Vincent, Bart.		Surrey
Viscount Wenman,		Oxfordshire
Richard Benyon, Esq.		Peterborough
Hon. James Murray,		Perthshire
Rowland Holt, Esq.		Suffolk
John Tempest, Esq.		Durham
John Damer, Esq.		Dorchester
NOMINEES.		
Of the Petitioners,		
George Johnstone, Esq.		Appleby
Of the Sitting Members,		
Bamber Gascoyne, Esq.		Truro.

PETITIONERS.

Philip Yorke, Esq. and Francis Cust, Esq.

Richard Johns, jun. alderman, and Matthew Wills, Richard Johns, Edmund Johns, Richard Penhall, and William Rogers, freemen of Helleston.

Sitting Members.

The Right Hon. Francis Godolphin Osborne, commonly called the Marquis of Carmarthen: and Francis Owen, Esq.

COUNSEL.

For the Petitioners.

Mr. Lee, Mr. Morris.

For the Sitting Members.

Mr. Mansfield, Mr. Bearcroft; and, the second day, Mr. Buller, (in Mr. Bearcroft's absence).

THE CASE OF THE BOROUGH OF HELLESTON.

ON Saturday, the 11th of March, the Committee being met, the two petitions were read, containing ſpecial allegations of the principal part of the following facts, which were all, either proved, or admitted, on the trial of the cauſe.

Helleſton is a borough by preſcription, and alſo by a charter of the 27th of Queen Elizabeth, confirmed by another of the 16th of Charles the Firſt.

By thoſe charters, the corporation was to conſiſt of a mayor, four aldermen, and an indefinite number of freemen. The freemen were to be elected out of the inhabitants, by the mayor, aldermen, *and commonalty*, or the major part of them; the aldermen, by the mayor and aldermen, out of the freemen; the mayor, by the freemen, out of two aldermen, to be nominated by the mayor and aldermen. The right of election of burgeſſes to ſerve in Parliament has conſtantly been, in the mayor and commonalty, which has always been underſtood to mean, the mayor, aldermen, and freemen only.

(☞ There is no determination of the Houſe of the right of election, but it was admitted to be as juſt ſtated.)

Almoſt ever ſince the time when the charter of Queen Elizabeth paſſed, notwithſtanding the proviſion there made, the mayor and aldermen had aſſumed, and exerciſed, the exclusive

excluſive power of electing freemen, and the commonalty had never had any ſhare in it.

In Eaſter term, 1769, two informations, in the nature of *Quo Warranto*, were exhibited in the court of King's Bench, againſt ſeveral perſons of the borough, to ſhew by what authority they claimed to be freemen, having been elected without the concurrence of the commonalty. In their plea, they inſiſted on a bye-law, not then exiſting in writing, by which the right of electing freemen was reſtrained to the mayor and aldermen. The proſecutor replied to this plea, denying the matter of the bye-law, and other facts alledged in it, and iſſues being joined thereon, one of the cauſes was tried at the ſummer aſſizes for Cornwall, in 1769, by a ſpecial jury, when a verdict was found for the defendants on all the iſſues: but, in Michaelmas term of the ſame year, the court was moved for leave to enter up judgment againſt the defendants, notwithſtanding the verdict, the proſecutor contending that the bye-law, on which they had founded their title, was repugnant to the charters, and void. The court were of that opinion, and judgment was entered up accordingly. The proſecutor then moved for, and obtained, leave to withdraw his replication in the other cauſe, and, having inſtead thereof demurred to the plea of the defendants, judgment of ouſter was pronounced againſt them. From theſe judgments, writs of error were brought in the Houſe of Lords, and the judges being called in, one of the cauſes was argued by counſel, after which the judges delivered their opinion, "That the election of freemen could not be exer-"ciſed by the mayor and aldermen excluſive of the com-"monalty." The judgment of the King's Bench, therefore, was affirmed.

By theſe, and other proſecutions of the ſame ſort, judgment of ouſter was obtained againſt all the members of the corporation except two aldermen and eight freemen.

By the ſtatute of the 9th of Anne, cap. 20. ſect. 4. a *diſcretionary power* is veſted in the court of King's Bench, to give leave to exhibit informations in the nature of *Quo Warranto* by the officer of the court, at the inſtance of private proſecutors, or (as they are called in that kind of criminal proceeding) *relators*. About ten or twelve years

ago, the court thought proper to eſtabliſh a rule to guide their diſcretion, by reſolving never to grant informations againſt any corporator who had been in poſſeſſion of his franchiſe twenty years, or upwards.

An information had been moved for againſt Hugh Rogers, one of the two remaining aldermen, and a rule granted to ſhew cauſe why ſuch information ſhould not be allowed; but, in the interval between granting the rule and the time appointed for ſhewing cauſe, the twenty years, during which he had poſſeſſed the franchiſe of a freeman, were completed. The court therefore, in compliance with the above rule, would not grant the information. For the ſame reaſon informations could not have been obtained againſt any of the other nine remaining corporators, they having all been freemen *de facto*, (though elected according to the uſage now determined to be illegal,) for above twenty years.

An information was exhibited againſt Richard Johns, the other remaining alderman, for uſurping the office of mayor.

Such being the ſtate of the borough, a petition was preſented to the King in Council in November, 1772, from ſeveral merchants, tradeſmen, freeholders, and inhabitants of Helleſton, in which Thomas Glynn, and Thomas Wills, two of the ten remaining corporators, joined, ſtating the two charters, and the facts juſt mentioned, and alledging, that the corporation was *totally diſſolved*; praying therefore ſuch relief as ſhould be thought fit.

This petition was referred to a Committee of the Privy Council, and by them (19 Dec. 1772) to the Attorney and Sollicitor General; who were attended by counſel both on the part of the petitioners, and on behalf of the major part of the ſubſiſting corporators, who had entered a *caveat* againſt the petition.

The Attorney and Sollicitor General reported (1 March, 1773) the facts which have been ſtated, and that, ſince 1770, there having been only two aldermen *de facto*, and none but freemen *de facto*, and no mayor, a queſtion was then depending in the court of King's Bench (in the cauſe againſt Richard Johns) whether the corporation was diſſolved on that account, or whether it might not continue

itſelf

itſelf by operation of the ſtatute of the 11th of George the Firſt. Upon the whole matter, they gave their opinion, that it would be inexpedient to adviſe the King to conſider the corporation as diſſolved, or to grant a new charter, while a competent number of freemen held their places *in fact*, and unqueſtioned by any judicial proceſs, and while it remained in ſuſpence in a court of juſtice, whether the corporation might not continue itſelf by courſe of law.

Afterwards, in Eaſter term, 1773, the cauſe alluded to was decided, and judgment given againſt Richard Johns; and, in the month of June, of the ſame year, Hugh Rogers, the other alderman, died.

The corporation then conſiſted of only one alderman and eight freemen, and there was no mayor.

On this change of circumſtances, the agent for thoſe who had petitioned in Nov. 1772, preſented to the Lords of the Committee, a new petition ſtating the alterations which had taken place, and that he was adviſed that the corporation was *totally and abſolutely diſſolved*, and incapable of preſerving or continuing itſelf, and could never be revived, or regain a legal exiſtence, unleſs the King ſhould think proper to grant a new charter of incorporation.

3 July, 1773, this petition was alſo referred to the Attorney General, and they were attended by counſel for the petitioners, and by the ſollicitor for thoſe who oppoſed the petition.

10 Auguſt, 1773, they reported the ſtate in which the corporation was at that time; that they were of opinion, that it could no longer continue itſelf; and that it would be proper to adviſe the King to grant a new charter.

Upon this report the agent for thoſe who ſollicited a new charter preſented another petition to the King in Council, praying, on their behalf, that certain alterations from the charter of Queen Elizabeth, ſtated in a paper annexed to the petition (A), might be introduced into the new charter.

In November, 1773, a petition was preſented to the King in Council from twenty-ſix inhabitants of the borough of Helleſton, praying to be made members of the corporation, if a new charter ſhould be granted.

At the ſame time, Matthew Wills one of the freemen, (on behalf of himſelf, of Richard Johns the alderman, of the other four petitioners in the ſecond petition preſented to the Houſe of Commons (1), and of a fifth freeman, ſince dead, being ſeven out of the nine remaining corporators), preſented a petition to the King in Council, ſetting forth, that the proceedings in order to obtain a new charter, tended to injure the rights of the members of the old corporation, and praying that the Attorney and Solicitor General might be ordered to review their two former reports, and that he, and the other perſons on whoſe behalf he petitioned, might be heard by their counſel on thoſe reports, and againſt the original petition.

19 November, 1773, theſe two laſt-mentioned petitions were referred to a Committee of the Privy Council.

17 January, 1774, the petition of the agent for thoſe who ſollicited the new charter, was, by the Committee of the Privy Council, referred to the Attorney and Sollicitor General, who, on the 26th of the ſame month, were attended by counſel, both on the part of the original petitioners, and for the alderman and ſix corporators who oppoſed the new charter; and, on the 9th of May following, they reported their opinion, as before, that it would be expedient and juſt for his Majeſty to grant a new charter on the general plan of that of Queen Elizabeth, but with ſome of the additions and variations which had been propoſed (B). The propoſed alterations of which they approved were ſtated in their report, and two of them were,

"That the freemen, who, notwithſtanding the charter, "had, by the uſage, been excluded from a ſhare in the "election of new freemen, ſhould be expreſsly excluded "by the new charter. And,

"That, by the new charter, a competent number of fit "perſons ſhould be appointed freemen."

They ſtated, that the former of theſe two alterations had been ſtrongly oppoſed.

12 May, 1774, the agent for the alderman and five burgeſſes, opponents of the new charter, (the ſixth having died about this time,) being a majority of ſix to two of

(1) *Vide* Liſt of the Committee, &c. *Supra.*

the

the eight now ſubſiſting corporators, preſented a petition to the Committee of the Privy Council, praying, that they might be heard by their counſel againſt ſuch of the deviations from the old charter, recommended by the Attorney and Solicitor General, as they conceived to be injurious to their juſt rights and privileges.

28 May, the Lords of the Committee took under conſideration the laſt report of the Attorney and Solicitor General, and the laſt-mentioned petition, and, having heard counſel on both ſides, reported to the King, that they were of opinion, that a new charter ſhould be granted with the alterations recommended by the Attorney and Solicitor General.

1 June, the King in Council approved of the report of the Committee of the Privy Council, and ordered, that the Attorney and Solicitor General ſhould prepare a new charter in conformity to their report.

15 Auguſt, the Lord Privy Seal, aſſiſted by the Chief Baron of the Exchequer, having heard counſel on both ſides, ordered the privy ſeal to be affixed to the new charter:

And, on the 3d of September, the Lord Chancellor, with whom a *caveat* had been entered, heard counſel on both ſides, and ordered the great ſeal to be affixed to the charter, which accordingly bears date the 3d of September, 1774.

In the recital therof, it is ſaid, "That the corporation is "now *in danger of being diſſolved*, and incapable of conti- "nuing itſelf, or of exerciſing and enjoying any of its li- "berties and franchiſes;" and this expreſſion was ſubſtituted in place of words importing, that it *was diſſolved*, in conſequence of the arguments of counſel.

A mayor, four aldermen, and thirty-one freemen, including the mayor and aldermen, were appointed *nominatim* by this charter. Richard Johns was made an alderman, and the other ſeven remaining corporators of the old body were appointed among the new freemen.

The charter was, on the 8th of September, delivered to Thomas Glynn, Eſq. the new mayor, who accepted it, and, on the 9th, iſſued notices ſeverally to all the new corporators, requiring them to meet on the 12th, in order

to

to accept the charter, and the offices to which they were thereby named. Accordingly, in conſequence of thoſe notices, they met on the 12th, and all, but the ſix old corporators, petitioners to the Houſe of Commons, accepted the charter and their offices, and took the oaths. Each of thoſe ſix ſeverally read a proteſt againſt the charter, and refuſed to accept, or act under, it.

On Sunday, the 25th of September, the corporation met for the choice of a mayor (the Sunday before Michaelmas being the day fixed for that purpoſe, both by the old and new charters) and John Rogers, Eſq. was elected. The ſix proteſting freemen did not attend at this election.

The precept for the election of members of Parliament was ſent by the ſheriff to Mr. Rogers, who gave notice that the election would be on the 11th of October.

On the day of election, the precept being read by Mr. Rogers, as mayor, all the new members of the corporation, but the ſix who had refuſed the charter, voted for the two ſitting members. The ſix, after *proteſting* againſt the legality of Rogers acting as preſiding officer, gave their votes at *his* poll for Mr. Yorke and Mr. Cuſt. They afterwards proceeded by themſelves to make an election of thoſe two gentlemen. Richard Johns *there* acted as preſiding officer, and made a return which was delivered to the ſheriff. Rogers alſo made a return of the ſitting members, which he annexed to the precept, and delivered to the ſheriff. Johns' return was firſt received, but the ſheriff, having taken the advice of counſel (Mr. Serjeant Davy and Mr. Buller,) annexed the return made by Rogers to the writ, and ſent it by his agent to the clerk of the crown. He alſo ſent him the other return by his agent, but not annexed to the writ. When the laſt-mentioned return was tendered to the clerk of the crown, he ſaid he could not receive it, as it was not annexed to the writ. It was accordingly rejected, and ſent back to Cornwall, but was produced by the under ſheriff, on the trial before the Committee.

The agent for the ſix corporators, who oppoſed the new charter, ſwore that he had obtained a copy of the firſt draft from the Attorney General, but that, though he had made repeated applications to him, to the Lord Privy Seal, and at the Secretary of ſtate's office, he could not obtain a liſt

of

of the names of the new corporators till the 3d of September, on the hearing before the Chancellor. The Lord Privy Seal had deſired the names to be read over to him, on the hearing before him on the 15th of Auguſt, but he ſaid it had not been in his power to take them down in writing.

Under all the circumſtances of this caſe, the counſel for the petitioners contended;

1. That the new charter was void, and that the only perſons who had a right to elect members of Parliament for Helleſton, were the ſubſiſting freemen under the old charter.

2. That if the charter were valid, ſtill the freemen appointed by it not having been in poſſeſſion of their franchiſe a year before the election, they were, by the ſtatute of the 3d of the preſent King, cap. 15, incapable of voting at the laſt election, and therefore the only competent electors, at that time, were the ſubſiſting members of the old corporation.

Their arguments were as follow.

1. If the old body exiſted as a corporation when the charter paſſed, and when it was tendered, acceptance by the majority of the old corporators was neceſſary to make it valid; and as they, after oppoſing it in every ſtage as containing eſſential alterations and variations from the former conſtitution of the borough, rejected it when offered for acceptance, it became, by ſuch refuſal, void to all intents and purpoſes.

It is unneceſſary to cite caſes to prove, that acceptance is neceſſary to give validity to a new charter granted to a ſubſiſting corporation. This is an eſtabliſhed and uncontrovertible principle of law, inſomuch, that in pleading the new charter in ſuch a caſe, you muſt ſet forth that it was accepted.

The queſtion then is, whether, in the preſent inſtance, the old corporation exiſted when the charter was tendered.

It is admitted that it did not exiſt ſo perfectly as to be able to elect new corporators ſo as to continue itſelf. But it was not, therefore, diſſolved.

There are only three ways by which a corporation can ceaſe to exiſt.

1. For-

1. Forfeiture, by *abuſer*, or *non-uſer*.
2. Voluntary ſurrender.
3. The death of all the *natural* perſons, members of the corporate body.

Forfeiture cannot diſſolve a corporation but by judgment of ouſter againſt the whole.

Surrender can only be by acceptance on record.—But there is no pretence of ſurrender in this caſe.

And there is no queſtion but that eight of the natural perſons, members of the aggregate body, are ſtill alive.

It is true that ſome of the *integral* parts of the corporation are gone: There is no mayor; and only one alderman: Therefore, it does not exiſt with ſufficient vigour to continue itſelf.

But it exiſts ſo as that the individuals, who ſtill remain members of it, can do many acts, and exerciſe ſeveral franchiſes, as corporators (C). They can enjoy any right of common belonging to the corporation; they can accept or refuſe a charter; and they can vote for members of Parliament. If they can, no new charter can transfer that right from them to another corporation.

The caſes of Bewdley, Plympton, Durham, and Colcheſter, are authorities in point, to prove this doctrine.

In the caſe of Bewdley (1), a new charter had paſſed the great ſeal in 1708, and was tendered to the corporation juſt on the eve of an election for members of Parliament. The corporation being in a ſituation very ſimilar to that of Helleſton, the charter was refuſed by the ſubſiſting members of the old body. In 1710, Mr. Lechmere was choſen one of the repreſentatives of the borough by the new corporation, and Mr. Winnington by the members of the old who had refuſed the charter. The matter was brought before the Houſe by petition (2), when the three following reſolutions were come to, 19 December, 1710.

(1) 1. Peere Williams, p. 207. The Queen, v. the bailiffs and burgeſſes of Bewdley. Chandler's Debates, an. 1710. vol. iv. p. 174.

(2) Journ. 1 Dec. 1710. vol. xvi. p. 408. col. 1, 2.

1. Re-

1. Reſolved, "That Salway Winnington, Eſq. is duly "elected a burgeſs to ſerve in this preſent Parliament for "the borough of Bewdley.

2. Reſolved, "That the charter, dated the 20th of April, "1708, attempted to be impoſed upon the borough of "Bewdley, againſt the conſent of the ancient corporation, "is void, illegal, and deſtructive of the conſtitution of "Parliament.

3. Reſolved, "That an humble addreſs be preſented to "her Majeſty, laying before her Majeſty the reſolution of "this Houſe, and to deſire her Majeſty that ſhe will be "pleaſed to give directions to her Attorney General, to "take the proper methods for repealing the ſaid charter, "and for quieting the ſaid borough in the enjoyment of "their rights and privileges (3)."

Accordingly, an addreſs was preſented, and, in compliance with that addreſs, a writ of *Scire facias* was ſued out to repeal the charter, and iſſue being joined upon it, the cauſe was tried at the bar in the court of Queen's Bench, and a general verdict found for the Queen againſt the charter.

Afterwards, indeed, a new trial was moved for, and obtained, and then a ſpecial verdict was found, which ſeems never to have been argued, and no further proceedings appear to have taken place. This will be objected to the authority of this caſe; and it will be obſerved, that the borough of Bewdley has ever ſince 1712 acquieſced under the charter of Queen Anne, and that the corporation now exiſts under it. But no argument can be drawn from the agreement of the parties, which muſt have been the occaſion of the proceedings being dropt, and the reſolution of the Houſe of the 18th of December, 1710, is a direct parliamentary deciſion againſt the legality of the charter.

The caſe of Plympton was as follows. In 1684 (12 July), the corporation had been prevailed upon to ſurrender their charter, and a new one was granted by James the Second, 21 March, 168$\frac{4}{5}$, under which new charter two members were choſen and returned to Parliament; but on a petition of the mayor, bailiff, &c. of

(3) Journ. vol. xvi. p. 439. col. 1.

the

the old corporation (1), the election and return were determined to be void, and the House, 14 April, 1690, Resolved, "That the charter, granted by the late King "James to the borough of Plympton, is illegal, and de-"structive to the constitution of the government (2)."

And John Avent, the pretended mayor, and returning officer, was sent for into the custody of the serjeant at arms (3).

The corporation of Durham has had no mayor for several years, and is in that imperfect state that it cannot elect one according to the constitution of the borough. A new charter has long been in agitation, but the bishop and the corporation differing about the terms, it has never taken place, nor has he ever imagined that he could impose one upon them without their consent. Yet, in this situation, they have elected members of parliament (4), and nobody ever pretended that those members were illegally chosen.

But the case of Colchester is quite decisive.

In that case, as reported by Sir James Burrow (5), it appears that the corporation of Colchester, under the old charter of the 15th of Charles the Second, consisted of a mayor, to be chosen annually from among the aldermen, 11 aldermen, 18 assistants, and 18 common-council, the corporate name being, "*The mayor and commonalty.*"

In 1735, one William Seaber executed a bond to the mayor and commonalty. In 1740 there were judgments of ouster pronounced against all the persons acting *de facto* as mayor and aldermen in Colchester, and all those persons were dead before the year 1763. 9 Sept. 1763, the present charter was granted, and accepted, and has been acted under ever since. In Easter term, 1766, the new corporation brought an action of debt on Seaber's bond against his executor.

The

(1) Journ. vol. x. p. 352. col. 1. & *infra*. 24 March, $16\frac{89}{90}$. 29 March, 14 April, 1690.

(2) Journ. vol. x. p. 378. col. 1.

(3) *Ibid.* col. 2.

(4) One of the members for Durham was on the Committee.

(5) 3 Burr. 1866. Mayor and commonalty of Colchester, v. Seaber.

The queſtion then was, Whether the preſent corporation could maintain the action, which depended on another queſtion, *viz.* Whether the old corporation was diſſolved in 1763.

On this occaſion Lord Mansfield ſaid:

"The corporation is not diſſolved by the judgments of "ouſter, and ſubſequent deaths of the mayor and alder-"men, though they are without their magiſtracy. Their "conſtitution is not deſtroyed and gone. Their former "rights remain. Would not a freeman of Colcheſter "ſtill continue to have a *right to common, or to vote for* "*members to Parliament?*—

"I am clear, upon principles of law, that the old cor-"poration was not *abſolutely diſſolved* and annihilated, "though they had loſt their magiſtrates.—Where there "is a judgment againſt the corporation itſelf, the caſe "would be of a different conſideration."

The other Juſtices, Wilmot, Yates, and Aſton, concurred.

This was decided after ſolemn argument by ſome of the ableſt lawyers in Weſtminſter-hall.

The very preamble of the new charter of Helleſton acknowledges that the old corporation was not diſſolved; for it ſtates it to be "*in danger of being diſſolved.*"

It therefore appears, from principle and precedent, that the old corporation exiſted when the new charter was tendered; that, if there never had been a new charter, the old corporators had a right to chooſe the repreſentatives for the borough; that the new charter having been rejected, it is to be conſidered as void, and as if it had never exiſted.

But, if this doctrine were not ſo clear as it has been ſhown to be, ſtill,

2. The new corporators could not vote at the laſt election, having been made freemen within the year.

By the ſtatute of the 3d of George the Third, it is enacted, "That no perſon whatſoever claiming as a freeman "to vote at any election of members to ſerve in Parlia-"ment for any city, town, port, or borough in England, "Wales, and the town of Berwick upon Tweed, where "ſuch voter's right of voting is as a freeman only, ſhall

"be

" be *admitted* to give his vote at ſuch election, unleſs ſuch " perſon ſhall have been *admitted* to the freedom of ſuch " city, town, port, or borough, twelve kalendar months " before the firſt day of ſuch election (1)."

The preſent caſe is within the very *words* of this ſtatute; for the expreſſion, " *admitted* to his freedom," ought not to be reſtrained to a narrow technical ſenſe, as implying only formal admiſſions to freedom, which cannot take place when a corporation and its individual members are created by a charter.—The word " *admitted*," is here uſed in its general popular ſenſe.

And certainly the caſe is within the *ſpirit* of the ſtatute. The miſchief which the legiſlature meant to remedy appears by the title. It is called " An act to prevent *occaſional* freemen from voting at elections of members to ſerve in Parliament for cities and boroughs." Thoſe new corporators, appointed only one month before the election, were, ſurely *occaſional* freemen.

If the act were only to extend to freemen not *admitted* (to their freedom) above a year, in a ſubſiſting corporation, the greater miſchief would ſtill remain without a remedy; for a miniſter would have it in his power to elude the law, by creating by charter ſuch a number of freemen, as would ſuffice to turn the election.

COUNSEL for the ſitting members.

1. When the new charter paſſed, the old corporation was totally diſſolved.

2. The ſix who refuſed the charter, cannot be conſidered as acting, on that occaſion, in a *corporate* capacity, but merely as *individuals*, and, therefore, their refuſal did not affect the validity of the charter.

3. The votes of the members of the new corporation were not affected by the ſtatute of George the Third.

A corporation is a political perſon, which, like a natural perſon, is capable of a variety of actions. It may renew itſelf. It may acquire, or grant lands, or perſonal property. It may ſue, or be ſued, in a court of law. It may make laws and regulations for its own government, &c.

The

(1) 3 Geo. III. cap. 15. §. 1.

The power of creating corporations is in the King, by his prerogative royal. They all exiſt, either by charter, or by preſcription, which *preſumes* a charter before the time of legal memory. They are created for the purpoſes, either of trade, or the adminiſtration of juſtice.

Every corporation aggregate conſiſts of certain integral parts, chalked out by the hand which formed it. If it ceaſes to have the form given it, if any of its vital parts are loſt, it no longer exiſts in that ſtate in which it was endowed with its particular powers; it is no longer that thing on which thoſe powers were conferred; and therefore it ceaſes to exiſt.

One eſſential attribute of a corporation is the name. That name *muſt* be employed in all acts done by the corporation. The name of the old corporation of Helleſton was, "The mayor and commonalty;" but as there neither is nor can now be a mayor, the name is loſt.

A corporation can only act when aſſembled in a corporate capacity (C), and there can be no legal aſſembly unleſs it be called by the mayor, or chief officer (except in ſome particular caſes where it is otherwiſe provided by act of Parliament (1).

If this corporation had been poſſeſſed of lands, and ouſted, they could not have brought an action to recover them. If their tenant were in arrears for his rent, they could not diſtrain or ſue for it. If their mace were taken away, they could not maintain *trover* for it as a corporate body, though the perſon who had the cuſtody of it might, in his *private* capacity as an individual.

If the corporation was diſſolved, the remaining individuals who had belonged to it could neither accept nor refuſe the new charter but as individuals, and the refuſal by ſix of them cannot conclude any body but themſelves.

The general doctrine applies with particular force to the preſent caſe, for here the eight ſubſiſting corporators were choſen illegally. Johns has ſworn that they were elected

(1) 11 Geo. I. cap. 4. *Vide infra.*

elected in the ſame manner with thoſe who have been ouſted (1). They might therefore have been all turned out, either by the ancient writ of *Quo Warranto*, or by an information in the nature of a *Quo Warranto* filed by the Attorney General. The diſcretionary rule with regard to twenty years poſſeſſion is only binding on the court that made it. It cannot affect the power of the Attorney General. It ought not to prevent this Committee from enquiring into the titles of thoſe men. Such limitations cannot be made to operate generally, and to conclude all perſons and all courts, but by act of Parliament.

The proceedings of the Houſe of Commons in the caſe of Bewdley will not have much weight, when the whole of them are taken together, and the ſpirit of the times when that caſe happened is taken into the account.

In 1708, ſoon after the new charter was granted, Henry Herbert, Eſq. a whig, was elected under it, and returned; and Salway Winnington, Eſq. a tory, was choſen under the old charter. On a petition of Mr. Winnington (2), the Houſe, *at that time*, reſolved, "That Samuel Slade, "nominated bailiff by a charter granted by her Majeſty "(i. e. the new charter) for maintaining the peace and "good government of the ſaid borough, was rightful "bailiff of the ſaid borough at the time of the election of "a burgeſs, to this preſent Parliament;" and declared, that Mr. Herbert, (then Lord Herbert of Cherbury) was duly elected (3). In 1710, a new conteſt happened, but then the tories were the reigning party, and the ſteps which have been mentioned by the counſel for the petitioners were on that occaſion taken by the Houſe. In 1714, there was a third conteſt, and the whig candidate was choſen, and returned, by the new corporation. Mr. Winnington, who was again a candidate, and ſtood on the ſame ground as formerly, petitioned (4); but, before his petition could be

(1) This Johns himſelf acknowledged on his examination before the Committee.

(2) Journ. vol. xvi. p. 11. col. 1. 24 Nov. 1708.

(3) Journ. ſame vol. p. 97. col. 2. 8 Feb. $170\frac{8}{9}$.

(4) Journ. vol. xviii. p. 32. col. 2. 30 March 1715. Same vol. p. 123. col. 2. 17 May.

be heard, the well known revolution in the miniſtry took place, and he judged proper to withdraw it (2).

The proſecution at law never came to a deciſion. The firſt verdict was againſt the opinion of the court. The Chief Juſtice (3) had directed the jury to reſerve the points of law, "for that they were of too great moment to be "determined without conſideration." One of thoſe points was, "Whether the corporation could ſubſiſt without one "of its integral parts (4)?"

In that caſe, there was a ſort of ground for contending that the old corporation was not diſſolved, for there was a bailiff *de facto*, and judgment had been given for him (5) in 1707, on an information in the nature of *Quo Warranto*. The bailiff was the integral part of the corporation ſuppoſed to be loſt.

But after all, as this cauſe never came to a determination, and the old corporation acquieſced under the new charter, which has been acted on ever ſince, this caſe is rather in favour of the new charter of Helleſton.

In the caſe of Plympton, there had been a compulſive ſurrender of the old charter, and the new one materially altered the conſtitution of the borough, by putting the magiſtrates entirely in the power of the Crown, and by narrowing the right of election. On theſe grounds the Houſe determined the new charter to be illegal. This does not appear directly from the Journals, but it may be fairly inferred from the hiſtory of the many *Quo Warrantos*, ſurrenders, and new charters, which made ſuch a noiſe at the latter end of the reign of Charles the Second, and the beginning of that of James the Second, and particularly from the account given in the Journals of the proceedings of the Houſe in the caſe of the borough of Ludlow, which had received a new charter ſimilar to that of Plympton, in like circumſtances, and in the ſame year (6).

(2) Same vol. p. 135. col. 1. 24 May. *Vide ſupra*, Introd. p. 15.
(3) Parker, afterwards Lord Macclesfield.
(4) Peere Will. *loc. cit.*
(5) Journ. vol. xvi. 8 Feb. 1708-9.
(6) Journ. vol. x. p. 521, 522. 22 Dec. 1690.

Durham is in a ſituation very different from that of the old corporation of Helleſton. In Durham, perſons acquire their freedom, either by ſervitude or election into companies, at certain guilds holden by thoſe companies. The *admiſſion* by the mayor is a mere ceremony, and when there is no mayor to perform that ceremony, they are entitled to vote for members of Parliament without it. There are new freemen made every day at Durham, although the corporation has been ſo long without a mayor, ſo that there is no danger of the right of election coming to be a ſort of monopoly in the hands of two or three obſcure perſons, which would be the caſe in Helleſton, if the doctrine contended for on the part of the petitioners were true. For no new freemen could ever have been choſen under the old charter.

The determination in the caſe of Colcheſter was ſubſtantially *juſt*, for it was ſhameful in the defendant to attempt to elude the payment of the money; but, as a *legal* deciſion, it gave great aſtoniſhment in Weſtminſter-hall, and the words which the reporter has put in the mouths of the Chief Juſtice, and the other Judges, are unſupported by any caſe in his book, and are againſt law. They contain a monſtrous doctrine. The court determined the cauſe immediately after the counſel had finiſhed their arguments, without leaving any interval for deliberation; and the counſel for the defendants cited no caſes, although many might have been produced in his favour, as, indeed, on examination, many of thoſe will appear to be, which are ſaid to have been cited againſt him.

But whatever may have fallen from the court on that occaſion, the ſame court, and two of the ſame Judges, in a very recent caſe from this very borough of Colcheſter, upon a motion for a *mandamus* to the mayor and aldermen to chooſe forty-eight guardians of the poor, under a ſtatute of the 9th and 10th of King William, by which a corporation was created, conſiſting of the mayor, aldermen, and forty-eight guardians of the poor, refuſed to grant the *mandamus*, becauſe one of the *integral parts* being gone, the corporation itſelf was diſſolved (D).

It is ſaid, the recital of the new charter ſtates, that the "old corporation was *in danger* of being diſſolved;" and thereby

thereby admits that it was not *actually extinct*, but if these words are to be taken so very strictly, still they can only show that the Attorney and Solicitor General, who prepared the charter, doubted, where, in truth, there was no room for doubt. They are not the words of the petitioners, and the whole of the charter proceeds on the supposition that a *new* corporation was to be *created*, not the old one revived.

There are many authorities and cases which shew that the loss of an integral part is to be considered as occasioning a dissolution of the corporation.

In Rolle's Abridgement, under the title "*Quelle chose "dissolve la Corporation*," it is said, "If a corporation is "made of brothers and sisters, and then all the sisters are "dead, all grants and *acts* done by the brothers afterwards are void; for when the sisters are dead, it is not a "perfect corporation (1)."

And in Comyns's Digest, vol. iv. p. 415. "If a corporation refuses to continue the election of officers till "all die who could make an election, the corporation is "dissolved."

In the third year of George the First, an information, in the nature of *Quo warranto*, was exhibited against one Mr. Painton, recorder of Banbury, for exercising that office, when the corporation having slipt the charter-day for the election of their mayor, that integral part was gone. The court of King's Bench held, that Painton was not legal recorder, although he had been chosen when the corporation was full, because it was now *dissolved* (2). The parties acquiesced in this decision, and applied for a new charter.'

In 1723, the mayor of the borough of Tiverton having absented himself on the charter-day for electing his successor, no new mayor could be chosen. The year following the Crown was applied to for a new charter, and the business was referred to Sir Philip Yorke, and Sir Clement Wearg, then Attorney and Sollicitor General, for their opinion. In their report, they state the foregoing case of Banbury, and, after observing that the decision there had

(1) Roll. Abridg. p. 514. let. I.
(2) 10 Modern. p. 356.

not been contradicted by any ſubſequent opinion of the court where it was made, nor of any ſuperior court, they ſay, "That they apprehend it comes up to the caſe before "them, and is a clear authority in law that the corpora-"tion of Tiverton is at an end." They therefore adviſe the King to grant a new charter (E).

To prevent the inconvenience that attended the power which the preſiding officers of corporations had of *diſſolving* them, by keeping out of the way on the day appointed by their conſtitution for the election of magiſtrates, it was enacted by the ſtatute of the 11th of George the Firſt, cap. 4. "That *for the future* the corporation, in ſuch caſes, ſhall "*not be deemed or taken to be diſſolved*;" and it is provided, that the perſons entitled to chooſe the magiſtrates ſhall proceed to make the election on the day immediately following the charter-day, without the mayor or other preſiding officer, and that the perſon next in office ſhall hold the court, and be the preſiding officer for that purpoſe.

This ſtatute is a legiſlative authority to ſhow the general rule to be true, that when an integral part of a corporation is loſt, and cannot be reſtored, the corporation itſelf is gone. Such a conſequence is indeed prevented, as to the particular ſituation to which the ſtatute applies a remedy; and if only the mayor had been gone in Helleſton, ſince the ſtatute, the corporation might have continued itſelf, and might have elected a new mayor. But there is no proviſion in the ſtatute touching corporations which are reduced to have no legal members ſufficient to chooſe a mayor or other magiſtrates,

The borough of Maidſtone, by a charter of James the Firſt, was incorporated by the name of the "mayor, "jurats, and commonly of the town and pariſh of Maid-"ſtone." The mayor was to be elected out of the jurats, by their naming two, of whom the commonalty were to chooſe one. The jurats, by the mayor, jurats, and commonalty out of the inhabitants. The freemen, by the mayor and jurats.

About the year 1742, a new charter was applied for, there being no mayor or legal jurat then exiſting. But there were five or ſix hundred freemen, and about two hundred of them oppoſed the new charter. Sir Dudley Ryder,

Ryder, and Sir John Strange, then Attorney and Solicitor General, to whom the matter was referred, after ſtating thoſe facts in their report (29 April, 1742,) delivered their opinion, that the corporation was *diſſolved*.

In 1763, application having been made for a new charter for the borough of Carmarthen, it was granted, and accepted by the individuals to whom it was tendered; but at the election in 1768, twenty members of the old corporation, who, like the remaining eight in Helleſton, had enjoyed their franchiſe for above twenty years, offered to poll under the old charter, and were rejected: and the Houſe, upon a petition, Reſolved, 8 March, 1770, "That they had no right to vote (1), (F)."

The preſent charter is very different from that of Plympton, and others granted by James the Second. They were juſtly holden to be illegal, becauſe, as has been already obſerved, they left the members of the corporation at the mercy of the Crown, and narrowed the right of election for members of Parliament, which the King has no power to do (1). The new charter of Helleſton, on the contrary, extends that right by encreaſing the number of voters, a power which has never been refuſed to the Crown, and is not ſo much as queſtioned by Lord Coke, when he lays it down that the right of election cannot be *reſtrained* by the King's prerogative (3).

The ſituation of Helleſton called for a new charter, and the law officers, far from being reprehenſible, did what it was their duty to do, when they adviſed the Crown to grant it. In granting it, the Crown proceeded with the utmoſt deliberation and circumſpection, counſel having been heard no leſs than ſix times in the progreſs of the buſineſs. The alterations from the old charter are ſuch as were highly expedient, and *that* chiefly oppoſed was proved to be convenient by the conſtant uſage of the borough ever ſince the firſt was granted.

If no new charter had been granted, the old corporators muſt, *ex neceſſitate*, have choſen and returned two burgeſſes to

(1) Journ. vol. xxxii. p. 763. col. 2.
(2) Coke, 4 Inſt. p. 48.
(3) 4 Inſt. *loc. cit.*

to Parliament. But even in that caſe they could not have claimed a *legal* title to vote, for it is impoſſible that men not choſen agreeable to the old conſtition ſhould have a legal right to vote under it. Their votes *de facto* muſt have been allowed, merely that the repreſentation of the nation in the Houſe of Commons might not be defective (C). But now that abſurdity is removed by the new charter.

The old corporators complain of that charter with an ill grace, ſince they are all thereby made members of the new corporation, when it was in the King s power to have left them all out of it.

If no charter can be valid but by *their* acceptance, the conſequence will be, that thoſe ſix men, and, when five of them are dead, the ſingle one who ſurvives, will ſend two members to Parliament.—Such an abſurdity cannot be the conſequence of legal principles.

If the new charter is illegal, why has not a *Scire facias* been ſued out in order to repeal it by the regular courſe of law?

That the votes of members of the new corporation were not affected by the ſtatute of the third of the preſent King, is clear from the *words* of that ſtatute. The qualification created by it, regards perſons *admitted* to their freedom within the year: a man never can be ſaid to be admitted into what does not exiſt. Till thoſe men were *made* freemen by the new charter, the corporation to which they belong had no exiſtence; therefore they cannot be ſaid to have been *admitted* into it.

This is alſo clear from the *ſpirit* of the act. The occaſion of paſſing it is well known. The magiſtrates of Durham had groſsly abuſed their power of electing and *admitting* freemen, by pouring in about ſix hundred during an election for members of Parliament. The legiſlature meant to put a ſtop to ſuch abuſes for the future. But there was no complaint at that time of any abuſe of the prerogative in creating freemen, to ſerve election purpoſes. It is impoſſible to ſuppoſe that Parliament had any view to freemen *created by charter*.

What would be the conſequence of the conſtruction of the ſtatute inſiſted upon on the part of the petitioners? Let

us ſuppoſe the new charter to be void, and the ſole ſurvivor of the old corporators to die within a year before an election; will it be contended that, in ſuch a caſe, there could be no members of Parliament choſen for Helleſton under any new charter which the King could poſſibly grant.

COUNSEL for the Petitioners, in reply.

To contend that the eight ſubſiſting members of the old corporation were incapable of giving legal votes, is to ſay that, ſince the reign of Queen Elizabeth, no man has either given a legal vote, or been legally elected, for the borough of Helleſton, becauſe, ſince that time, there have been no freemen who had any other title, but what *they* have, to their franchiſe.

But there has been no judgment of a court of law againſt them. An attempt was made to obtain ſuch a judgment againſt one, but without ſucceſs; and the Houſe, when the votes of perſons have been objected to, whom they found in the open avowed poſſeſſion of their franchiſe, have always enquired, whether their title has been queſtioned at law, and if it has not, when there had been any opportunity, or, having been queſtioned, if the attempt has failed, they have never ſuffered it to be impeached before them.

The caſe of the corporation of Colcheſter *v.* Seaber, is directly in point to ſhow that that of Helleſton was not diſſolved. The queſtion which in that caſe was directly before the court was, whether the corporation was diſſolved or not; and the court held that the Crown had only given new integral parts to a corporation *actually ſubſiſting*, in order to revive it, and give it vigour; and it is ſtated, that what gave it vigour was the *acceptance* of the new charter. This ſhows that it might have been refuſed.

It has been thrown out that this caſe was not warranted by thoſe which were cited on the ſide on which the deciſion was given; but this will not appear probable to thoſe who conſider who the counſel, and who the judges were. And it is remarkable that the caſes of Banbury and Maidſtone, which on the preſent occaſion have been cited as againſt the principle

principle of the Colcheſter caſe, were, in that very caſe, cited by Mr. Juſtice Wilmot, as entirely conſonant to it.

The words in the recital of the new charter were not inſerted through any ſlip or inaccuracy, but after the former words had been propoſed, and the matter argued by counſel. The charter itſelf is, therefore, an authority, it is the authority of the Attorney and Sollicitor General, to ſhow that there was a corporation actually ſubſiſting; and, if ſo, it ſeems to be admitted that their acceptance was neceſſary to give validity to the charter.

As to the report of the law-officers, in the caſe of Tiverton, which, by the bye, was no judicial determination, it appears by the concluſion, that they recommended the granting a new charter, becauſe, "*if the corporation was* "*diſſolved*, they conceived nothing but a new charter could "reſtore it, and *if it was not diſſolved*, the new charter "would not deprive any perſon of the rights he might "claim under the old corporation, or prevent any legal "enquiry whether the old corporation was diſſolved or "not." (E) The point, therefore, was not then decided, and it has been, ſince, in the caſe of Colcheſter.

The purpoſe of appointing the new corporators by name, can have been no other but to take them out of the operation of the ſtatute of George the Third. But, for the reaſons already given, they are ſtill within the meaning and ſpirit of that ſtatute. A certain proof that the word "*admitted*," is not there uſed in a limited technical ſenſe is this; that in the very ſame ſentence, the ſame word is uſed with regard to perſons received to vote at an election: "No freemen ſhall be *admitted* to vote at any election, &c. "unleſs ſuch perſon ſhall have been *admitted* to his free-"dom twelve calendar months, &c." If the legiſlature had in that ſtatute affixed any ſtrict technical idea to the word, they would not, in the ſame breath, have uſed it both in its technical and popular ſenſe. The caſe of Carmarthen is not at all parallel to this. Several of the twenty old corporators had joined in the petition for the new charter for that borough, and none of them had claimed to act as burgeſſes under the old one, from 1758 till 1768. The new charter was *accepted* by *all* the perſons named in it,

it, and, till the laſt mentioned year, it had never been objected to. The Houſe, therefore, thought juſtly, that it was then too late to liſten to any complaint againſt it by men at whoſe requeſt it had been granted (F).

On Tueſday, the 14th of March, the Committee, by their Chairman, informed the Houſe, that they had determined,

That Philip Yorke, Eſq. and Francis Cuſt, Eſq. the Petitioners were duly elected, and ought to have been returned.

Accordingly the order was made which is uſual in caſes of ſingle returns, when the determination is in favour of the petitioners, *viz.*

" Ordered, that the deputy clerk of the crown do at-
" tend this Houſe (to-morrow morning) with the laſt re-
" turn for the borough of Helleſton, in the county of
" Cornwall; and amend the ſame, by raſing out the names
" of the Right Hon. Francis Godolphin Oſborne, com-
" monly called Marquis of Carmarthen, and Francis
" Owen, Eſq. and inſerting the names of Philip Yorke,
" and Francis Cuſt, Eſqrs. inſtead thereof (2). "

But the next day, when the deputy clerk of the crown attended according to the above order, Sir John Hynde Cotton, the Chairman of the Committee, acquainted the Houſe, that the return upon which they had determined, was not *that* then in the hands of the clerk of the crown, but was an indenture of return executed by Richard Johns, alderman of the ſaid borough, and ſeveral other perſons, and which had been by the ſaid Richard Johns tendered to the ſheriff of the county, but had not been by him annexed to the writ for the ſaid County, and that the ſaid return had been produced to the Committee by the ſheriff of the county. He then delivered Johns' return in at the table, and, the order for altering the other being diſcharged, a new order was made,

" That the deputy clerk of the crown do amend the ſaid
" return, by taking off the file the indenture of return
" annexed to the writ for the county of Cornwall, and by

(2) Votes, p. 366.

" annexing

" annexing thereto the indenture of return, executed by " the said Richard Johns and others, and now delivered " in at the table."

And this was done accordingly (3).

(3) Votes, p. 369, 370.

NOTES.

NOTES

ON THE CASE OF

HELLESTON.

PAGE 5. (A). The following were the additions and alterations propoſed to be made in the new charter.

1. That there be a deputy mayor, to be nominated by the mayor out of the aldermen, and to act, in his ſickneſs or abſence from the borough, in like manner as the mayor could do if preſent.

2. That there be a deputy recorder, as well as town clerk, to be nominated by the recorder for the time being, to act in his ſickneſs or abſence from the borough, in like manner as the recorder could if preſent.

3. That the recorder, or his deputy, have a voice in all elections and corporate meetings, and take place next to the mayor.

4. That all the aldermen, and the deputy recorder, be juſtices of peace for the borough, and that the county juſtices, who have never acted within the borough, be expreſsly excluded from acting therein.

5. That in all aſſemblies, or meetings for the elections of mayor, aldermen, recorder, and freemen, and in all acts to be done by the mayor, recorder, and aldermen, or the major part of them, the mayor, or, in his abſence, his deputy ſhall, when the voices are equal, have a caſting vote; and that, upon the death of a mayor, the recorder, or, in his abſence, his deputy, ſhall have a caſting vote in the election of a new mayor, when the voices are equal.

6. That the freemen who, notwithſtanding the charter, have by the uſage of the borough been excluded from voting in the election of new freemen, be expreſsly excluded by the new charter.

7. That the aldermen continue for life, unleſs removed for reaſonable cauſe.

8. That a competent number of fit perſons be nominated and appointed by the charter to be freemen of the borough.

P. 6.

P. 6. (B). The report of the Attorney and Sollicitor General on this occaſion was,

" That they had been attended by counſel on the part of the " petitioner, and alſo on the part of the remaining burgeſſes " of the ſaid borough, and that they ſubmitted to their Lord- " ſhips, that it was their opinion, that it would be expedient " and juſt for his Majeſty to grant a new charter of incorpo- " ration to the ſaid borough, upon the general plan of the char- " ter of Queen Elizabeth, with ſome of the additions and va- " riations which had been propoſed to their Lordſhips, parti- " cularly the two firſt.

" That the third contained an innovation in the form of the " conſtitution, which, having been objected to, they did not " think of ſufficient conſequence to be adopted.

" That they recommended the 4th propoſal to their Lord- " ſhips, except ſo far as it purported to exclude the juſtices of " the peace for the county at large, ſo that the reſt of it was " but a ſmall, and that a convenient addition to the charter of " the 16th of Charles the Firſt.

" That they had made ſome ſlight alterations in the 5th " propoſal, to anſwer the purpoſes of it more completely, and " propoſed it to be as follows:

" That, in aſſemblies or meetings for the election of mayor, " aldermen, recorder, and freemen, and in all acts to be done " by the mayor and aldermen, or the major part of them, where " the voices are equal, the mayor, or, in his abſence, his de- " puty, ſhall have the caſting vote; and that, upon the death " of a mayor, the perſon who laſt ſerved the office of mayor " preſent at ſuch election ſhall have the caſting vote in the elec- " tion of a new mayor, if the voices be equal.

" That the 6th propoſal, though it had been ſtrongly op- " poſed, they thought fit to be adopted, as it provided a me- " thod of election which had been conſtantly practiſed in the " place, though not ſuitable to the legal conſtruction which " had, at length, been put upon the old charter.—That, the " old charter being now removed, it ſeemed moſt expedient to " give the ſanction of law to the cuſtom of the place.

" That they thought the 7th propoſal very reaſonable; and " *that the 8th was of courſe.*"

(*** In the charter of Queen Elizabeth, only the mayor and aldermen were ſpecifically appointed. There was probably a conſiderable number of old freemen exiſting at the time.)

P. 10, 15, 22. (C.) It would ſeem that there are two very different ways in which a man may exerciſe the franchiſe of a corporator.

1. He

1. He may, as a member of the corporation, concur in the joint act of the aggregate body. Such joint or *corporate acts* as require the concurrence of all the eſſential *integral* parts of the whole cannot be performed, when any of thoſe *integral* parts are loſt. Of this ſort are, The taking or granting lands, bringing or defending actions, and ſo forth.

Whether the acceptance or refuſal of a new charter, ſo as either to complete its validity, or to make it void, are ſuch acts as have juſt been deſcribed, and require that the corporation ſhould poſſeſs all its neceſſary *integral* parts, or whether they may not be done by the major part of the remaining individual members of an imperfect and mutilated corporation, was one of the queſtions agitated in this caſe.

2. A corporator may ſeverally and *individually* do acts, and enjoy privileges, which, however, he is only entitled to do, or enjoy, as being a member of an aggregate body. Of this ſort are, The voting for a member of Parliament, exerciſing a right of common, and many others which might be mentioned. "It "is no new thing," (ſays Lord Holt, ſpeaking of a corporator's right of voting for a member of Parliament) "but agree-"able to the rules of law, that a franchiſe ſhould be veſted in "the congregation aggregate, and the benefit of it to redound "to the *particular* members, and to be enjoyed by them in "their *private capacity*." (Lord Raym. p. 952.)

According to the doctrine in the caſe of the corporation of Colcheſter againſt Seaber, acts and privileges of this ſort may be done or enjoyed by the individual members of a corporation, although the aggregate body has loſt ſome of its eſſential integral parts. This was the other main queſtion on the firſt point in this caſe. We muſt conclude from the event of the cauſe that the Committee decided on the *firſt* point, and adopted the doctrine contended for by the counſel for the petitioners, becauſe they conſidered the legal return to be that which Johns made. If they had thought that the only thing that vitiated the votes of the new corporators was their being made within the year, ſtill the return by Rogers would have been the legal return, and as the ſix old corporators voted at his poll (though under a proteſt), their ſix votes being (on ſuch a ſuppoſition) the only good ones on that poll, his return would have been amended according to the firſt order made by the Houſe for that purpoſe.

P. 18. (D). A gentleman who was the leading counſel on one ſide, in that caſe, has favoured me with the following note of it.

THE KING againſt the MAYOR and ALDERMEN of COLCHESTER. Trin. 14 Geo. III. 1774

Upon a rule to ſhow cauſe why a *mandamus* ſhould not go to the mayor and aldermen of Colcheſter, to proceed to an election of 48 perſons duly qualified under the act of the 9th and 10th of William the Third, to be *guardians of the poor* of the ſaid town, the caſe was this:

By the ſtatute referred to, a corporation was created, conſiſting of the mayor and aldermen of Colcheſter for the time being, and of 48 other perſons, guardians of the poor, to be choſen in a manner preſcribed, for the purpoſes of aſſeſſing and levying the poor-rates in the town of Colcheſter, building hoſpitals, workhouſes, &c.

By the proviſions of the act, the firſt 48 guardians were to be choſen at once, 12 out of the inhabitants of a certain deſcription within each of the four wards into which the town is divided. The ſix of each 12 who were *firſt* elected for every ſeveral ward were to ceaſe to be of the corporation at the end of two years, and ſix others to be choſen in their room by the inhabitanss of the reſpective wards, at a meeting to be holden *by the mayor and aldermen* for that purpoſe; that is, 24 new guardians were to be choſen every ſecond year for the whole town, and all the 48 to be changed every four years.

Informations in the nature of *quo warranto* having been exhibited, about the year 1740, againſt the then mayor and aldermen, and judgments of ouſter obtained thereon, there ceaſed to be any mayor or aldermen, and there could be none choſen agreeable to the charter. The conſequence of this was, that there could be no meeting holden for the election of new guardians according to the regulations of the act of King William; neither could the remaining guardians hold any meetings for diſpatching the buſineſs of the corporation, for they too were, by the act, directed to be holden by the mayor and aldermen. To remedy theſe inconveniences, a temporary act paſſed in 1742, (15 Geo. II.) impowering certain governors of a charity, who were alſo choſen under the ſtatute of King William, to hold the meetings for the management of the buſineſs of the corporation, and appointing 12 perſons *nominatim* to officiate in the room of the mayor and aldermen, during the continuance of this temporary act, or till the King ſhould be pleaſed to reincorporate the town, and no longer. This act expired ſome time in 1745, and from that time the poor-rates were aſſeſſed, levied, and diſpoſed of, by parochial overſeers, appointed by the juſtices of the peace for the county, according to the general law eſtabliſhed by the ſtatute of queen Elizabeth (1). In 1763,

(1) 43 Eliz. cap. 2.

1763, the King granted a new charter, which revived the corporation of the borough with its former conſtitution. The poor-rate however continued to be under the management of parochial overſeers, with this difference, that thoſe overſeers were now nominated by corporation juſtices appointed under the charter. There had been no election of guardians of the poor under the ſtatute of King William, ſince 1742, and the corporation created by that ſtatute had entirely ceaſed from acting ſince 1745, ſo that for a long time there had not been one of the 48 guardians exiſting.

The *mandamus* was now applied for tv compel the mayor and aldermen, (under the new charter of 1763) to hold a meeting for the election of 58 guardians, according to the ſtatute of William the Third,

On the part of thoſe who made the application, (beſides arguments of convenience and policy, drawn from opinions of perſons living at Colcheſter, declared in their affidavits) the caſe of the corporation of Colcheſter and Seaber was much relied on, as proving that the mayor and aldermen were now to be conſidered as holding their offices under the old charter of the town, which had only been *revived by* that of 1763. This being the caſe, it was ſaid that they were integral parts of the corporation created by the ſtatute of King William, and competent to hold a meeting for the election of the 48 guardians.

On the other ſide, (beſides arguments from expediency alſo) it was ſaid, among other things, that by the ſtatute of William the Third, a power of chooſing 48 *all at one time* was only given for *once* after the creation of the corporation; that ſuch power had been exerciſed, and was now gone.

LORD MANSFIELD.

" The policy of the act is not open to diſcuſſion. If it " were, I am of opinion that it is better to have a large diſtrict " than a ſmall one.

" My great difficulty is, whether we can grant a *mandamus* " to *revive* the corporation. But it ſeems to me to be *diſſolved*. " I conſider the mayor and aldermen as one integral part, and " the 48 as another integral part. The 48 muſt be ſuppoſed " all gone. The reſt of the corporation created by the tempo- " rary law is alſo gone; ſo there is not a ſingle member left.

" Whether the revival of the corporation of the borough " extends to this power of chooſing the guardians members of " the other corporation, is a queſtion very different from the " queſtion in Seaber's caſe. The temporary act of George the

" Second

" Second ſeems to ſuppoſe it would extend to *that* when it " ſhould take place. I ſhall not go upon that.

" I do not remember any inſtance of a *mandamus* for an integral part."

Mr. J. Aston.

" There is no inſtance of a *mandamus* to reſtore an integral " part. A *mandamus* is diſcretionary, and the court will not " grant it in ſuch a caſe."

' *Nota.* The court was of opinion they could not grant ' a mandamus for a whole integral part, and that the corpo- ' ration, which was to conſiſt of two integral parts, by the ' diſſolution of one of theſe, was itſelf diſſolved. But if the ' law were otherwiſe, yet, as the *mandamus* is diſcretionary, ' the court would not, under the preſent circumſtances, ' grant it, as it would introduce ſo much confuſion.'

P. 20, 24. (E.) The words of the report of the Attorney and Sollicitor General, in 1724, in the caſe of Tiverton (after taking notice that the charter-day had elapſed without the election of a mayor) are,

" As to which conſequence of not electing a mayor on the " charter-day, Mr. Attorney and Sollicitor General humbly " certify, that, in the caſe of Mr. Painton, the late recorder " of Banhury, for exerciſing the ſaid office of recorder, at a " time when there had been no mayor elected for that corpora- " tion upon the charter-day, your Majeſty's court of King's " Bench were of opinion, that, the ſaid corporation being re- " duced to an abſolute incapacity of acting as a corporation in " any reſpect whatever, was diſſolved, and conſequently, if " there was no corporation, Mr. Painton could be no longer " recorder; in which opinion the parties acquieſced, and ap- " pli d to your Majeſty for a new charter, and the ſaid opi- " nion has never been contradicted by any ſubſequent reſolution " or opinion of that court, nor by any ſuperior court, and Mr. " Attorney and Sollicitor General humbly apprehend this judg- " ment comes up to the preſent caſe, and is a clear authority " in law, that by reaſon of this default the corporation of Ti- " verton is at an end. And, as to the granting a mandatory " writ, they cannot but think it would be moſt deſirable in the " preſent caſe, as tending moſt to the preſervation of the an- " cient franchiſes, provided it would be effectual in point of " law for the purpoſe intended. But *that* they conceive it can- " not be, becauſe if there is no corporation in being, there is " nobody to whom the writ can legally be directed. or that can

" legally

" legally execute it (1), unleſs it is conſidered as creating a " corporation for that purpoſe, in which view it will be liable " to the ſame objections which are made againſt a new charter; " for ſuch corporation ſo created, muſt be a new corporation. " For which reaſons, and conſidering the great doubts that " have been always made concerning this proceeding, there is " juſt reaſon to fear, that if your Majeſty ſhould order a man- " datory writ to iſſue in this caſe, it might only tend to lay a " further foundation of uncertainty and confuſion in this bo- " rough. And Mr. Attorney and Sollicitor General offer it " as their opinion upon the whole matter, that the ſafeſt and " moſt adviſeable method of reſtoring to the inhabitants of this " town, the capacity of acting as a corporation, and the fran- " chiſes and privileges which they formerly enjoyed, is by a " new charter of incorporation and confirmation. For, if the " corporation is diſſolved, they conceive nothing but a new " charter can reſtore it, and, if it is not diſſolved, ſuch new " charter will not deprive any perſon of the rights which he " claims under the old corporation, or prevent any legal en- " quiry, whether the old corporation be diſſolved or not."

(*** I am obliged to the ſame gentleman who furniſhed me with the note of the caſe of the King againſt the mayor and aldermen of Colcheſter, for the above copy of the report in the caſe of Tiverton, and for that of the preſent Attorney and Sollicitor General given in note (B), and the propoſed alterations in the new charter in note (A).

The caſes of Banbury and Tiverton gave riſe to the ſtatute of the 11th of George the Firſt, cap. 4.

P. 21, 25. (F.) It appears, from the account of this caſe in the Journals, that evidence was produced to ſhow, That, *ſeveral* of the men claiming to be burgeſſes had ſigned petitions for the new charter, which recited, that the old corporation was diſſolved; That none of them had, till that election, ever claimed to act as burgeſſes after judgment of ouſter had been obtained againſt one Roger Philips, in 1758; that they had notice thereof, and acquieſced in it. By that judgment, his election, which had been made under a bye-law, transferring the right of election from the mayor, burgeſſes, and commonalty, to the mayor and common-council. Journ. vol. xxxii. p. 763, col. 2.

(1) The warrant ſometimes directed by the King to the magiſtrates of the former year, for a borough in Scotland, when the legal day of election has been ſlipped, is in the nature of the mandatory writ, which it would ſeem had been propoſed in the caſe of Tiverton, but which the Attorney and Sollicitor General thought could not be executed. *Vide infra*, Caſe of Wigtown, &c. note (I).

XV.

THE CASE

OF THE BOROUGH OF

BEDFORD,

IN THE COUNTY OF BEDFORD.

The Committee was choſen on Tueſday, the 14th of March, and conſiſted of the following Gentlemen.

John Elwes, Eſq. Chairman.	Members for	Berkſhire
Thomas Dundas, Eſq.		Orkney & Zet.
George Grenville, Eſq.		Bucks
Richard Aldworth Neville, Eſq.		Grampound
Ambroſe Goddard, Eſq.		Wiltſhire
Jervoiſe Clarke, Eſq.		Yarmouth Hts
William Ewer, Eſq.		Dorcheſter
Filmer Honywood, Eſq.		Steyning
Sir Brownlow Cuſt, Bart.		Grantham
James Sutton, Eſq.		Devizes
John Cooper, Eſq.		Downton
Daniel Laſcelles, Eſq.		Northallerton
Andrew Foley, Eſq.		Droitwich

NOMINEES.

Of the Petitioners,

Lord George Germaine — Eaſt Grinſt.

Of the Sitting Members,

Richard Jackſon, Eſq. — New Romney

PETITIONERS.

Samuel Whitbread, Eſq. and John Howard, Eſq.

Certain Burgeſſes, Freemen, and Inhabitants, being freeholders of Bedford, and electors for that borough.

Sitting Members.

Sir William Wake, Bart. Robert Sparrow, Eſq.

COUNSEL

For the Petitioners.

Mr. Lucas, Mr. Lee.

For the Burgeſſes, &c. Petitioners.

Mr. Macdonald.

For the Sitting Members.

Mr. Bearcroft, Mr. Hardinge, and (on Mr. Bearcroft's abſence) Mr. Arden.

THE CASE

Of the BOROUGH of BEDFORD.

WHEN the Committee met, on Wedneſday, the 15th of March, the two petitions were read.

That of Mr. Whitbread and Mr. Howard, (beſides the uſual allegations, of the partiality of the returning officers in admitting and rejecting votes, and that the petitioners had a great majority of legal votes, and were duly elected), contained a charge of bribery againſt the ſitting members, by themſelves or agents (2).

The other alledged; That the mayor, aldermen, and other officers of the borough had, previous to the election, got a majority of *pretended* electors under their own influence, with a deſign to render the election of the members for the borough ſubſervient to the will of the corporation; that they had corruptly made offers to one or more perſons to procure them to be elected, in conſideration of a large ſum of money to be paid to them; and that John Cawne, John Roſe, and Thomas Howard, the returning officers, had been guilty of corrupt, partial, and illegal practices, previous to, and during the courſe of, the election (3).

The laſt determination in the Houſe of the right of election in Bedford, was then read, and is as follows:

(2) Votes, 6 Dec. 1774. p. 29, 30.
(3) Votes, *loc. cit.* p. 30, 31.

12 April, 1690, Reſolved, "That the right of election "of burgeſſes to ſerve in Parliament for the borough of "Bedford is in the burgeſſes, freemen, and inhabitants, "being houſeholders of Bedford, not receiving alms (1)."

(☞ The difference between a burgeſs and a freeman in Bedford is, that all the ſons of a burgeſs are entitled to be burgeſſes, and only the eldeſt ſon of a freeman is entitled to be a freeman. The magiſtrates are all choſen out of the burgeſſes.)

Then the ſtanding order of 1735-6 was read (2).

The numbers on the poll, as declared by the returning officers, were,

For Sir William Wake - -	527
For Mr. Sparrow - - -	517
For Mr. Whitbread - - -	429
For Mr. Howard - - -	402

There were ſeveral queſtions in this caſe upon the conſtruction of the laſt determination, and it being admitted that, if certain reſtrictions ſeverally contended for by the differerent parties, ſhould be holden by the Committee to be agreeable to the meaning of the determinations, they muſt ſucceed; it was agreed by the counſel on both ſides, and by the Committee, that thoſe queſtions ſhould be argued and decided ſeparately

Iſt Point] The counſel for the petitioners contended; That the expreſſion, "*being houſeholders of Bedford*," was to be applied as well to the *burgeſſes and freemen* as to the *inhabitants*; or, in other words, That *non-reſident* burgeſſes and freemen have no right to vote.

Their arguments were as follow.

It is at once moſt conſiſtent with logic, and with grammar, to extend the reſtriction at the end of the period to all the three claſſes of perſons mentioned in the antecedent part. Accordingly, the reſtraining words are very properly in the printed Journals ſeparated by a comma from the claſs laſt mentioned, (*viz.* "*inhabitants*," to ſhew, that

(1) Journ. vol. x. p. 376. col. 2.
(2) *Supra*, vol. i. p. 00.

their

their effect is not particularly confined to the laſt member of the ſentence.

The reſtriction is *reaſonable* as extended to burgeſſes and freemen in this borough. If it is juſt, that the repreſentatives of Bedford ſhould be choſen by thoſe who have a natural relation to the place, it is reaſonable that it ſhould not be in the power of the majority of the corporation, (by which name is underſtood about thirty perſons, the mayor, recorder, two bailiffs, thirteen common council, and from ten to fifteen aldermen,) who have, or claim the right of admitting any number they pleaſe of burgeſſes and freemen, to overwhelm and annihilate the voices of the inhabitants, by chooſing, when they think proper, an indefinite number of new burgeſſes and freemen, perfect ſtrangers to the borough, for no other purpoſe but to carry an election.

It is a *legal* reſtriction, for ſuch a reſtriction has, in many other boroughs, been recognized by expreſs reſolutions of the Houſe.

Any *uſage*, *ſince* the determination in 1690, cannot affect the ſenſe of that determination, which muſt have beeu founded on evidence of the uſage prior to that time; and it can be ſhown, not only that no evidence can be produced of *non-reſidents* having ever voted *before* 1690, but that, till then, the number of non-reſident burgeſſes and freemen had always been ſo ſmall, (only now and then a country gentleman of diſtinction, and chiefly the members for the borough, who were made free by way of compliment (1), that their votes could never have been of any conſequence at an election; and therefore that the Houſe, in making the determination, could have no view to them.

If the Houſe had meant to confine the reſtraint of being houſeholders merely to thoſe who vote as inhabitants, they would have expreſſed themſelves in unequivocal terms, ſuch as they have uſed in other caſes where they had that intention. They would have ſaid, that the right of election was in the burgeſſes, freemen, *and alſo in the inhabitants being freeholders*, or in the burgeſſes, freemen, *and ſuch of the inhabitants as are houſeholders*; or, to confine the reſtrictive clauſe to the laſt member of the ſentence, they would have

(1) This was proved by the corporation books.

uſed

uſed terms like thoſe employed in the laſt determination of the right of election in Wallingford.

15 Dec. 1709. Reſolved, "That the right of electing "burgeſſes, to ſerve in Parliament for the borough of Wal- "lingford, in the county of Berks, is in the mayor, al- "dermen, bailiffs, and eighteen aſſiſtants, *together with* "*the inhabitants of the ſaid borough, paying ſcot and lot,* "and not receiving alms, or charity (2)."

If the expreſſion "*being houſeholders*" is not to be carried back to all the members of the ſentence, neither can the ſubſequent words "*not receiving alms*;" and then we muſt ſuppoſe that the Houſe meant to declare that burgeſſes and freemen, even if they had received alms, had a right to vote; which would be to ſuppoſe that they thought the receipt of alms (or pariſh relief) no diſqualification to the burgeſſes and freemen of Bedford. But the Committee will not adopt ſuch a conſtruction, when they conſider that this is a general diſqualification by the law of Parliament.

COUNSEL for the ſitting members.

Where the ſenſe of a laſt determination is doubtful, evidence of uſage may be produced to ſhew the true intention and meaning of the ambiguous words. This was done in two very recent inſtances, thoſe of Radnor and Dorcheſter.

Although it is true, that direct evidence cannot be given to prove that *non-reſidents* have voted in this borough before 1690, it can be ſhewn that they conſtantly have at all conteſted elections for above forty years backwards; and evidence of uſage for ſuch a conſiderable number of years, without proof of a different uſage at any previous time, would, in law, be a ſufficient preſumption to eſtabliſh an immemorial Cuſtom.

It has been admitted, by the counſel for the petitioners, that they cannot bring any direct evidence to ſhew that non-reſidents never voted before the determination in 1690; and mere arguments by *implication and inference* againſt the uſage, at a *previous* period, cannot deſtroy the force of *direct* evidence of uſage, though *poſterior* to the time to which that

(2) Journ. vol. xvi. p. 243. col. 1. 244. col. 1.

implication

implication applies. Direct evidence, therefore, of the uſage for non-reſidents to vote *ſince* the determination, uncontradicted by direct evidence of an antecedent contrary uſage, is to be conſidered as eſtabliſhing ſuch uſage *previous* to the determination.

Arguments, from convenience or policy, may be very proper, addreſſed to the legiſlature to perſuade them to repeal a law (A), but they cannot weigh with a court of juſtice, in a caſe where the ſubſiſting law, whether politic, and convenient, or otherwiſe, is fixed and aſcertained by words, whoſe ſenſe, if they are of themſelves doubtful, is clearly interpreted by uſage. Yet, even on this ground of convenience and policy, the counſel for the petitioners argue againſt a maxim generally admitted to be founded in the principles of the conſtitution; namely, That the right of election ought to be extended as much as poſſible.

The receipt of alms is probably a diſqualification by the common law of Parliament, but the words "*not receiving* "*alms*" may, conſiſtent with grammatical conſtruction, be carried back through the whole ſentence (1) without the words, "*being houſeholders*;" or, if it ſhould be thought that they cannot, ſtill, in order to entitle the petitioners to any benefit from the argument drawn from thence, we muſt ſuppoſe; 1. That this diſqualification by alms is uncontrovertible as applied to burgeſſes and freemen. 2. That the Houſe of Commons thought ſo in 1920. 3. That the Houſe at that time meant to *declare* the law on this ſubject, not only with regard to inhabitants, but alſo with regard to *burgeſſes* and *freemen*.

Now the general principle, that alms diſqualify voters of all deſcriptions, has not been *proved*, and will probably be diſputed in a ſubſequent part of this caſe. If it were *admitted*, it does not follow that the Houſe of Commons thought ſo in 1690, and that they might not think, and intend to delare, that, by the *lex loci* in Bedford, only *inhabitants*, who were houſeholders, and *had not received alms*, could vote, but that all *burgeſſes and freemen* could, even *if they had received alms*. And, if it were alſo admitted, that

(1) Vide the reſolution of the Committee, *infra*.

we

we muſt preſume the Houſe to have known the general principle on this ſubject, it will ſtill remain to be proved, that it was impoſſible for them to intend to *declare* the general law by *expreſs words*, with regard to thoſe who were entitled to vote as *inhabitants*, and to leave the law to operate, without any expreſs declaration, with reſpect to the other two claſſes of *burgeſſes* and *freemen*.

The words "*being houſeholders*" cannot be carried back to the two firſt claſſes of voters, without rendering the mention of thoſe two claſſes ſuperfluous and nugatory; for to ſay, "That the right of election is in *the burgeſſes and* "*freemen, being houſeholders, and in the inhabitants, being* "*houſeholders, of Bedford*," expreſſes no more than would be done by ſaying ſimply, "The right of election is in *the* "*inhabitants, being houſeholders of Bedford.*"

Arguments from punctuation do not deſerve any regard. To prevent any arguments of that ſort, points are never uſed in law records: if they were to be conſidered as of any weight, it would be in the power of every clerk, copyiſt, or printer, to alter the meaning of a law.

After they had ſpoke in effect as has been juſt ſtated, the counſel were directed to withdraw, and, on being called in again, the Chairman informed them,

"That the Committee were of opinion, that they might "proceed to call *evidence*, to ſhew whether burgeſſes and "freemen had a right to vote, though not houſeholders of "Bedford, under the reſolution of the Houſe of Commons "of 12 of April, 1690."

An explanation of this reſolution of the Committee being deſired by the counſel, the Chairman ſaid, "It was meant "that they ſhould bring evidence of the uſage ſubſequent "to the laſt determination."

On this, a number of witneſſes, inhabitants and members of the corporation of Bedford, were called, who proved, from their own knowledge, that *non-reſident* burgeſſes and freemen had voted at different conteſted elections, ever ſince the year 1730. They ſwore likewiſe to a conſtant uncontroverted reputation.

The counſel for the ſitting members were proceeding to bring more evidence to the ſame purpoſe, but they were informed by the Chairman,

"That

"That the Committee were ſatisfied of the uſage ſince 1730."

No evidence was given on the part of the petitioners to ſhew, that, at any previous period, the uſage was that non-reſident burgeſſes and freemen were not admitted to vote.

Before the Committee came to any reſolution on this queſtion of *non-reſidency*, the counſel for the petitioners entered upon other two grounds of objection, which affected all the votes liable to the former.

The firſt was, That they were *honorary* burgeſſes and freemen.

The ſecond, That they were *occaſional*.

IId. Point.] On the firſt of thoſe two heads they contended, That the corporation of Bedford could not admit burgeſſes or freemen, unleſs perſons who had either an antecedent inchoate right by birth or ſervitude, or who had acquired ſuch a right by redemption; that is, by paying a real ſubſtantial conſideration in money for their freedom. That *honorary* burgeſſes and freemen, therefore, were in fact neither burgeſſes nor freemen, and could have no right to vote.

To prove this poſition they produced the following evidence:

1. Two bye-laws; one of 1562, and another of 1612. The firſt of thoſe applied rather to the point of non-reſidency. The ſecond ordains, "That there ſhall be no *foreigner* "admitted to be a freeman, unleſs under ſpecial circum-"ſtances (there mentioned;) and that if ſuch foreigner be "allowed, he ſhall pay five pounds for his freedom unto "the chamberlains for the time being, to the uſe of the "mayor, bailiffs, burgeſſes, and commonalty."

2. Entries of a variety of admiſſions on the payment of fines of different amount, from forty ſhillings to fifteen and twenty pounds, over and above the admiſſion fees. In many of thoſe inſtances, a condition is annexed to the order for admiſſion, that if the party do not find ſureties for the payment of his fine, or actually pay it within a limited time, the admiſſion ſhall be void.

3. Certain

3. Certain entries of the admiſſions of perſons in the time of the Republic, and ſubſequent entries, after the Reſtoration, declaring thoſe admiſſions to be illegal.

12 Aug. 1656. Major-General Boteler, Cockayne, Carter, Whitbread, and Wagſtaffe were admitted *gratis* to their freedom.

15 Oct. 1660. The jury find with regard to thoſe perſons, "*Quia contra jura, conſuetudines, & privilegia ejuſdem "villæ introducti fuere, per vim fraudem & ſurreptitie, eos "fore nullos de gilda, ſed extraneos & forinſecos.*"

From comparing theſe two entries, they argued, that the circumſtance of not paying any fine was what was againſt the *laws, cuſtoms, and privileges* of Bedford in the admiſſions in 1656.

It appeared that, in 1769, when above 500 of the freemen objected to as *non-reſident*, and now as *honorary*, were made, they only paid one guinea *including* admiſſion fees; and it was proved that, at that very time, the corporation had obliged ſeveral tradeſmen, inhabitants of the town, to pay five guineas for their freedom.

The counſel for the ſitting members produced, on the other hand, a great many entries in the corporation books, beginning in 1654, of orders for the admiſſion of perſons who had no previous title, "without the payment of any "fine or *preſtation* to the chamber, or even of the uſual "fees;" and many others, when the fines were of various, and very ſmall amount, down to fourteen ſhillings.

(☞ The inſtance in 1654, was the admiſſion of Sir Bulſtrode Whitelock.)

They then argued as follows:

If it was thought that the perſons admitted in 1769 were not *legal* freemen, why were they not proceeded againſt at law, by informations in the nature of *Quo warranto?* From that time till now their right to their freedom has not been impeached; and, although this Committee is competent to the deciſion of any preliminary queſtion which may lead to the ultimate determination of the merits of the election, yet they will not enter into an enquiry about corporate rights, when the parties have had full time to try them in the court particularly appropriated to ſuch queſtions, and have not done it. In the caſe of Shrewſbury, the

Committee

Committee would not go into ſuch an enquiry. There, indeed, there had been two verdicts at law on the queſtion (1). But, where there has been time to try the matter at law, it is fair to conclude, that the party who has not taken advantage of the opportunity, had good reaſon to think that the attempt would have been fruitleſs. One method of ſetting aſide all the freemen made iu 1769 at one ſtroke was tried, for an information was moved for, and obtained, againſt Heaven, the mayor of that year. If he had not been a legal mayor, all their admiſſions would have been illegal. But, after long conſultations of ſome of the ableſt counſel in Weſtminſter-hall, it was thought adviſeable to drop the proſecution.

It is not contended that the election of *honorary* freemen is contrary to any *general principle of law*. Indeed in many boroughs, as Glouceſter, Cambridge, &c. the right of making ſuch freemen has been recognized by the Houſe, and they vote at all elections; but the counſel for the petitioners inſiſt that, by the *particular law* of Bedford, perſons who have not inchoate titles cannot be admitted to the freedom of the place, unleſs on the payment of a ſort of *cuſtomary* fine. Now, one of the firſt requiſites of a cuſtom is *certainty*, and here they themſelves have ſhewn that the fine paid has been *different* in almoſt every different inſtance.

If the bye-laws, on which they rely, ſhould be thought to apply to this queſtion, yet being merely regulations made by the corporation to controul their own diſcretion, it was in the power of the corporation to repeal them; and this they have virtually done by acting afterwards without any regard to them, as has been proved by the numerous inſtances of their exerciſing the right of making honorary freemen, or freemen *by favour*, for above a century, down to the preſent time.

It cannot be ſeriouſly thought that, in the entry of 1660, with regard to the reſcinding the admiſſions of Boteler and the others, the words "*contra jura, conſuetudines, & privilegia*" mean, that they were admitted contrary to a ſpecific cuſtom of paying a fine. If that had been meant, the

(1) *Vide ſupra*, vol. i. Caſe of Shrewſbury.

the cuſtom would have been ſpecially ſtated, and not in general expreſſions, which are evidently mere words of courſe. It is pretty clear, when we conſider who thoſe perſons were, and compare the ſituation of things at the different æras of 1654 and 1660, that they were turned out, becauſe their party was no longer uppermoſt, and that the "*vis*," "*fraus*," and "*ſurreptitie*," only mean to convey a declaration that the corporation had admitted them through influence and compulſion.

IIId Point.] The counſel for the petitioners next contended, That the votes of thoſe who had been objected to as *non-reſident* and as *honorary* burgeſſes or freemen, were alſo void as being *occaſional*.

(☞ They had all been made above a year before the election, ſo that none of them were affected by the Durham act.)

They ſaid,

(1) Occaſionality is fatal to all votes, by the common law of Parliament. Before the ſtatute of the 3d of George the Third, cap. 15, there was no limitation in point of time, with regard to occaſional freemen, but if a man acquired his freedom merely for the purpoſe of voting at an election, although more than a year before that election, his vote, on that occaſion, was fraudulent and void. Now when a ſtatute is made declaratory of the common law, and only ſuperadds new penalties to the infringement of that law, within a certain time, or under ſpecial circumſtances, ſuch ſtatute is only cumulative, and does not take away the common law, or alter it, farther than by enforcing it for the limited time or under the particular circumſtances when the ſtatutory penalties are made to attach. Therefore, though the ſtatute of George the Third enacts, that a freeman, who has not been admitted twelve kalendar months before the election, ſhall not preſume to vote, under a certain penalty, unleſs he have an antecedent title by birth, marriage, or ſervitude, and that if he preſume ſo to do his vote ſhall be void, the common law diſqualification ſtill remains as to occaſional freemen of longer ſtanding than a year. The difference is this: within the year, the ſtatute *preſumes* the occaſionality, and makes it unneceſſary to prove it, whereas, beyond the year, it lies upon

(1) *Vide ſupra*, Caſes of Downton, Briſtol, vol. i. and of Helleſton, vol. ii.

upon the perſon who makes the objection of occaſionality to prove it, according to the general maxim, that fraud is not to be preſumed.

The counſel for the ſitting members admitted, that the perſons whoſe votes were objected to, had been made free of the town of Bedford for the purpoſe of voting at the election for that place. But they contended,

That to conſtitute a diſqualification by occaſionality, the freemen muſt have been admitted to ſerve the purpoſe of ſome particular candidate, or candidates, which was the caſe at Durham on the occaſion which gave riſe to the act of the 3d of the preſent King; that there was no ſuch purpoſe in view when thoſe freemen were made, (moſt of them in 1769), the preſent ſitting members not having been then thought of by any body for candidates; and beſides, they did not aſſent to the poſition of the counſel for the petitioners, but on the contrary were clear that, though at common law there was no limited time to which the occaſionality of freemen was reſtrained, yet, by the ſtatute, the legiſlature had drawn the line beyond which, ſince the time when that ſtatute paſſed, this objection cannot be made.

In reply, the counſel for the petitioners, beſides enforcing their former arguments, obſerved.

That the meaning of occaſionality cannot be confined to the intention of ſerving particular candidates, for that the freemen who are made at any time leſs than twelve months before the election, are, by the ſtatute, denominated occaſional; and, yet, in many inſtances, it is not known who the candidates will be till very near the time of the election, eſpecially in the caſe of a vacancy occaſioned by any unforeſeen event.

The counſel being directed to withdraw, the Committee deliberated for a conſiderable time, and when they were again called in, the Chairman ſaid he was directed to inform them,

" That the Committee were of opinion, that the words, " *being houſeholders of Bedford,*" contained in the reſolution " of the Houſe of Commons of 12 April, 1690, do not " refer to the *burgeſſes and freemen*, but to the *inhabitants* " only."

The

The Chairman likewiſe ſaid, (though not in the formal words of a reſolution,)

" That the Committee were clear in their opinion, that " the objection of occaſionality did not lie againſt free- " men made above a year before the election.'

They delivered no opinion concerning the right of the corporation to make *honorary* burgeſſes and freemen; but, as that objection, if the Committee had thought it valid, would have annulled the votes of all thoſe who were objected to as *occaſional* and as *non-reſident*; and as their votes were, after this preliminary deciſion, conſidered by the counſel on both ſides, in their ſubſequent arguments as eſtabliſhed, and were admitted to be neceſſary in order to give Sir William Wake a majority (1) on the poll, it follows neceſſarily, that the Committee were of opinion, that ſuch honorary burgeſſes and freemen are legal members of this borough.

☞ The ſeeming want of preciſion in the determination of the Committee on thoſe three diſtinct heads, muſt have ariſen in ſome meaſure from the counſel for the petitioners having gone from the queſtion of non-reſidency upon the other two, before the Committee had decided the firſt.)

The counſel for the petitioners having failed in the firſt part of their caſe, proceeded to another queſtion, which was,

IVth Point] Whether perſons having received of a charity called Harpur's charity, within a year (B) before the election, were entitled to vote, or whether ſuch perſons are diſqualified under the words, " *receiving alms*," in the laſt determination.

A great number of perſons in that predicament had tendered their votes for Mr. Whitbread and Mr. Howard, and were rejected by the returning officers.

The evidence produced on this ſubject was as follows.

By letters patent, bearing date the 15th of Auguſt, 1552, King Edward the Sixth gave licence to the mayor, bailiffs, burgeſſes, and commonalty of the town of Bedford, to erect a free-ſchool, having a maſter and an uſher, to be nominated by the maſters and wardens of New College,

(1) See the Determination in his favour, *infra*.

College, Oxford, and gave them liberty to acquire lands, &c. to the clear yearly value of *forty pounds*; to hold to them, the mayor, bailiffs, &c. for the ſuſtentation of the ſaid maſter and uſher, for the marriage of poor maids of the ſaid town, for poor children there to be nouriſhed and informed, and alſo, "*The Surpluſage coming or remaining of* "*the premiſes to diſtribute in alms to the poor of the ſaid town* "*for the time being.*"

Sir William Harpur, in conſequence of thoſe letters patent, did, in 1566, grant certain lands and houſes in Bedford, and alſo thirteen acres and one rood of meadow, in the pariſh of Saint Andrew, Holborn, in the county of Middleſex, to the ſaid mayor, &c. for the ſuſtentation of the ſaid maſter and uſher, for the marriage of poor maids of the ſaid town, and for poor children there to be nouriſhed and informed, "*according to the form of the ſaid letters* "*patent.*"

Theſe thirteen acres and a rood, were, ſoon after, reduced by encroachments to twelve acres, one rood, and thirteen poles.

About the year 1668, the corporation let them for a term of forty-one years, at the annual rent of ninety-nine pounds. The expiration of that leaſe would have fallen of courſe in the year 1709.

In 1684, a reverſionary leaſe was granted for the further term of fifty-one years, to commence at the expiration of the former, and at the yearly rent of one hundred and fifty pounds.

Under thoſe, and other drivative leaſes, the following ſtreets, &c. Bedford-Street, Bedford-Row, Bedford-Court, Prince's-Street, Theobald's-Row, North-Street, Eaſt-Street, Lamb's-conduit-Street, Queen-Street, Eagle-Street, and other ſtreets and courts, in the pariſhes of St. Andrew, Holborn, and of St. George, Queen-Square, were built and erected.

By this means, the eſtate was, at the expiriration of the term of fifty-one years, which happened in 1761, encreaſed to a great value; and it became expedient to have an act of Parliament paſſed, to regulate the management, and appropriation of the revenues.

Accordingly, in the year 176-, an act paſſed for that purpoſe, which, (after regulating the amount of the ſalaries

of

of the maſter and uſher, the ſums to be given for porrtioning poor maids, and a ſum to be applied yearly for apprenticing poor children, beſides other neceſſary expences); enacts, "That the *ſurpluſage* of the rents and profits ſhall "be diſtributed in *alms* to the poor of the ſaid town, for "the relief and ſupport of poor decayed houſe-keepers, "and other proper objects."

In the original bill, there was the following proviſo; "That no freemen or inhabitants of the ſaid town of Bed-"ford, receiving benefit from the ſaid charity eſtate, in "any manner whatever, ſhall be thereby diſqualified from "voting for members of Parliament for the ſaid town of "Bedford."

This clauſe was, at the third reading, (on an amendment for that purpoſe being moved) left out of the act.

By the act, a certain number of truſtees are added to thoſe who were ſo by the original foundation, as members of the corporation.

Such being the nature of this charity, it was proved, by a great number of witneſſes (ſeveral of whom had been truſtees of the charity, and overſeers of the poor, and ſome, agents at elections); That this charity had been diſtributed to many perſons who had paid to church and poor; That about three fourths of thoſe who had received it at the laſt diſtribution, paid the pariſh taxes, ſome of them to the amount of nine ſhillings; That it has always been given to middling ſort of people, without ſollicitation on their part; That it has always been conſidered, in Bedford, as a ſort of *donation*, and diſtinguiſhed from pariſh pay, the charity being called *Hall-money*, (becauſe it is diſtributed at the common-hall) and the pariſh pay *collection*. One Neguſs, (a perſon of fifty years of age) ſwore particularly to a man who rents eighteen pounds a year, and yet received the charity; and to another who received it, although he paid nine ſhillings a year to the pariſh of which he (Neguſs) is overſeer. The ſame witneſs ſwore, that his own father died nineteen years ago, aged ſeventy, and that he had heard him ſay, that he had received the charity conſtantly from the firſt year of his marriage, and that he had voted at Sambroke's election, in 1730, and at other elections, and that no objection was ever made to his vote.

All the witneſſes ſaid, That, till the laſt election, they had never heard the right of Harpur's charity men to vote called

called in queſtion; That it was always underſtood they had a right; That many, to their knowledge, had voted at every conteſted election which they recollected. (The names of ſeveral were ſpecified.) That the votes of perſons receiving pariſh pay had always been rejected, and that, to know whether any perſon had received it, recourſe was always had to the pariſh books; but that, when this objection of Harpur's charity was ſtated at the laſt election, it aſtoniſhed every body.

The counſel for the ſitting members ſaid, they could no call any witneſſes to contradict or diſprove thoſe facts.

COUNSEL for the Petitioners.

It is clear, from the nature of the charity, and from the words of the reſolution, as interpreted by the uſage which has been proved, and not contradicted, that the charity in queſtion does not diſqualify.

That charities of this ſort do not neceſſarily diſqualify, by the common law of Parliament, is proved by the caſe of Coventry.

24th February, 1701-2. It was reſolved, "That the "freemen of Coventry receiving alms, or charity, have no "right to vote in the election of citizens, to ſerve in Par-"liament for the city of Coventry (1)."

Yet, though the very word "*charity*" is uſed in that diſqualifying reſolution, the Houſe afterwards determined, on the 1ſt and 3d of March, 1708-9, "That Sir Thomas "White's gift (2), and Thomas Wheatly's gift (3), do "not diſqualify." Both which charities are exactly analogous to that now under the conſideration of the Committee.

In general, where, by the uſage of the place, perſons receiving relief from the revenues of particular charities are diſqualified, the Houſe, in determining the right of election in that place, has inſerted the word "*charity*" in the diſqualifying part of the reſolution. The caſe of Taunton

(1) Journ. vol. xiii. p. 763. col. 1.
(2) Journ. vol. xvi. p. 129. col. 2.
(3) Journ. ſame vol. p. 135. col. 1.

is particularly ſtrong to ſhow that the word "*alms*" alone does not, in the language of Parliament, comprehend particular charities (1).

There are, to be ſure, caſes to be found in the Journals, where it has been determined that charities founded by private perſons diſqualify, although the word "*alms*" only has been uſed in the reſolution declaring the right of election; but there are none, where it has been ſo holden, when the uſage had been (as in the preſent caſe) proved to be in favour of the votes of men receiving ſuch charities.

That, in the preſent caſe, in the determination of 1690, the Houſe, by the word "*alms*," meant only pariſh relief, will appear from an attentive examination of the evidence on which the determination was formed. The evidence then produced was, a declaration of the common-council, bearing date the 19th of December, 1687, "That every "inhabitant, not taking *collection*, nor being ſojourner, "hath a vote (2)."—Now "*collection*" has been proved to be the term by which pariſh pay is ſpecially diſtinguiſhed to this day in Bedford (2). It is a term familiar to the legiſlature in that ſenſe, as appears by a great variety of ſtatutes, 27 Hen. VIII. cap. 25. 1. Edw. VI. cap. 3. 5 and 6 Edw. VI. cap. 2. 5 Eliz. cap. 3. 17 Geo. II. cap. 3. § 1. Indeed, one of the firſt ſtatutory modes of relieving the poor, before the act of the 43d of Elizabeth, was literally by *collection* made on Sundays in the pariſh church (4).

The reaſons why many think that *alms* or *pariſh collection* diſqualify by the common law, and that the reſolutions of the Houſe where they are mentioned, are only declaratory of that law, do not apply to the *charity* in queſtion. Thoſe reaſons are, that men who are obliged to truſt to the pariſh for their ſuſtenance, would not be able to contribute to the wages of their members, and that ſuch indigent perſons can have no independent will of their own, and cannot give a free ſuffrage. The major part of thoſe who received Harpur's charity, have been proved to be in circumſtances ſuf-

(1) Supra, vol. i.
(2) Journ. vol. xvi. p. 376. col. 1.
(3) Supra, p. 48.
(4) 27 Hen. VIII. cap. 25. 1 Edw. VI. cap. 3.

ficiently

ficiently eaſy to contribute to the maintenance of others, and to pay both to church and poor (1).

COUNSEL for the ſitting members.

"*Alms*" is certainly a generic word, comprehending every ſpecies of pecuniary relief beſtowed on the poor for their ſuſtenance, and when "*charity*" is uſed to ſignify ſuch relief, two words are convertible and ſynonimous. This appears by the very etymology of "*alms*," which is taken from the French word "*aumones*," anciently written "*almoſnes*," and that from the Greek word "Ελεημοσυνη," which is thus defined by the grammarians, "*Omne beneficium quo calamitoſos proſequimur.*" The word "*alms*" is uſed to expreſs the part of Harpur's charity which was to be diſtributed to the poor, both in the letters patent of Edward the Sixth, and in the act of Parliament of the preſent King; and by ſeveral orders of the truſtees for the diſtribution of the money ſince the ſtatute, they themſelves call it "*alms.*" One of thoſe orders of 31ſt Dec. 1770, is, "That 200l. the ſurplus of the Bedford *charity*, be diſtributed in *alms* to to the poor." (☞ This was read from the books of the charity)

If "*collection*" is the expreſſion, which, by the cuſtom of Bedford, is peculiarly appropriated to *pariſh relief* in that place, the Houſe, in 1690, if they had meant that no other ſort of charity diſqualified there, would have made uſe of that word. We may therefore infer that, by chooſing to employ another word, they meant a different, and more general, diſqualification.

In the caſe of many boroughs, where the Houſe had declared the right of election to be in perſons not receiving *alms*, they have, on ſubſequent occaſions, decided that the receipt of *charities*, like that now under conſideration, are within the diſqualification.

28 January, 1695-6, Reſolved, "That the right of "electing of burgeſſes, to ſerve in Parliament for the bo-

(1) Supra, p. 48.

" rough of Ayleſbury, in the county of bucks, is in all the " houſeholders, not receiving *alms* (1)."

7 February, 1698-9, Reſolved, " That all perſons re- " ceiving *alms* within the borough of Ayleſbury, purſuant " to the will of Mr. Bedford; or any other perſons receiv- " ing any *other charity*, annually diſtributed within the ſame " town; are, in reſpect thereof, diſabled to vote in the " election of burgeſſes to ſerve in Parliament for the ſaid " borough (2)."

Mr. Bedford's charity in Ayleſbury, is exactly ſimilar to Sir William Harpur's (C). It is obſervable, that, in this laſt reſolution, the Houſe uſe " *alms*" and " *charity*" as words importing exactly the ſame thing.

2 December, 1708, Reſolved, " That the right of " electing burgeſſes, to ſerve in Parliament for the bo- " rough of Reading, in the county of Berks, is in the " freemen, and inhabitants; ſuch freemen not receiving " *alms*, and ſuch inhabitants paying ſcot and lot (3)."

4 December, 1708, " A motion being made, and the " queſtion being put, that ſuch perſons, as have, *within* " *two years* laſt, received *Kendrick's charity*, *or any other* " *annual charity*, diſtributed in the borough of Reading, " have a right to vote in elections of burgeſſes, to ſerve " in Parliament for the ſaid borough;—It paſſed in the " *negative* (4)."

By the ſtatute for regulating elections in the city of London, perſons having received *alms* within two years, are diſabled from voting; and thoſe who are acquainted with the practice in the city, know that thoſe words of the ſtatute have been conſtantly underſtood, and conſtrued, to extend to *all charities*.

If the Houſe has, on ſome occaſions, drawn a line between *alms* and *charities*, by making a diſtinction where there is no difference, this is to be aſcribed to motives which are too well known to have often influenced the former judicature in deciding the rights of election. But thoſe caſes, (although the deciſions of them may be concluſive

(1) Journ. vol. xi. p. 419. col. 2.
(2) Journ. vol. xii. p. 490. col. 2.
(3) Same, vol. xvi. p. 26. col. 2.
(4) Same vol. p. 27. col. 1.

cluſive in the particular places with regard to which they were made, in conſequence of the ſtatute of George the Second (1), are not certainly of a ſort to direct the judgment of Committees in other caſes where their authority is not binding.

In many inſtances where the words "*alms*" and "*charity*" are both uſed, we are to conſider it as mere tautology, a thing not very uncommon in parliamentary language.

If "*alms*," according to the fair meaning of the word, includes all charities; if ſuch an interpretation of it is authoriſed by the ſober and reaſonable deciſions of the Houſe; and if *Harpur's charity* has been particularly ſo denominated by the founder, (ſince in his deed of gift he refers to the letters patent where alms is the only word uſed) by the legiſlature, and by the truſtees of the charity, we muſt infer, firſt, that all charities were meant in the determination of 1690; and, ſecondly, that *this* charity more particularly muſt be conſtrued to be within the meaning of that determination: but, if this is ſo, the uſage, of which evidence has been given, as it is poſterior to the determination, will be of no avail; eſpecially when it is conſidered that, till the expiration of the ſecond leaſe in 1761, the ſurplus money muſt have been ſo ſmall, and ſo few muſt have partaken of it, that it could not be of much conſequence at any election to object to their votes.

It has appeared that, in the bill for regulating this charity, a clauſe was at firſt inſerted, declaring that the perſons receiving it ſhould not thereby be diſqualified from voting, but that clauſe was rejected (2). Is not this a deciſion of the legiſlature itſelf that they are diſqualified?

The reaſons which have been given for the diſqualification occaſioned by the receipt of pariſh pay, are equally applicable to this charity; for, however improperly it may have been diſtributed in ſome particular inſtances, yet the true objects of it, according to the ſpirit both of the donation and the regulating ſtatute, are perſons who are in the ſame indigent and dependent ſituation with thoſe relieved by the pariſh.

The

(1) 2 Geo. II. cap. 24.
(2) *Supra*, p. 48.

The counſel for the petitioners ſaid, in reply,

That they had admitted that, in ſome caſes, the Houſe had decided that particular *charities* diſqualified, after there had been determinations where, in the diſqualifying part, the word "*alms*" alone was uſed; but that no ſuch inſtances could be found, where there was a conſtant uſage in favour of the votes of the perſons receiving the charities; and that, as to the uſage in this caſe, having been proved as far as living memory or reputation goes, it was, according to the reaſoning of the counſel for the ſitting members in the former part of the caſe (1), to be preſumed to have been always ſo. That the moſt reaſonable way of underſtanding the caſes juſt mentioned was, to ſuppoſe that, although by the firſt general determination, *alms* and not *charities* were mentioned, yet the Houſe had afterwards, *on evidence of the particular cuſtom of the place*, decided that certain charities did diſqualify, and not on the idea that they were comprehended under the word "*alms*" in the prior determination. That, before the 2d of George the Second, it was competent to the Houſe to make ſuch ſubſequent deciſion extending the diſqualification beyond that contained in the firſt, without conſidering the ſecond as *explanatory* of the firſt; and that the inſtances which had been adduced happened before that ſtatute took place.

That the amendment of the act of Parliament for regulating the charity had only left the law as it was before, and that the clauſe was thrown out becauſe it is an eſtabliſhed rule, in bills of that ſort, not to ſay any thing of general rights. That if the legiſlature had meant to declare that Harpur's charity diſqualifies, they would have inſerted a direct clauſe for that purpoſe.

The arguments on this queſtion being finiſhed, the Committee deliberated for ſome time among themſelves, after which, the counſel being called in, the Chairman ſaid he was directed to inform them,

"That the Committee were of opinion, that perſons "receiving Sir William Harpur's charity are not thereby "diſqualified, within the meaning of the determination "of

(1) *Supra*, p. 48.

« of 12 April, 1690, from voting for members of Par-
« liament for Bedford."

Vth Point.] The counſel for the petitioners then propoſed to add 36 voters (inhabitants and houſeholders) to the poll, who had been rejected becauſe they had come into the pariſhes where they reſide in Bedford with certificates from other pariſhes.

They ſaid,

That a certificate does not put a man in the ſituation of a pauper, being only an eventual indemnity to the pariſh where he comes to dwell, in caſe he ſhould, at any future period during his reſidence there, become an object of pariſh-relief; that a perſon therefore worth a hundred thouſand pounds may have a certificate; and that it has no where been holden that a certificate is a general diſqualification in all boroughs, although in ſome, as Taunton (1), it is ſo, by the peculiar uſage of the place.

The leading counſel for the ſitting members admitted this, and, after ſome ſtruggle by the other, it was *agreed*, that the votes rejected on this ground ſhould be added to the poll.—And the counſel for the ſitting members alſo admitted, That, in conſequence of the reſolution of the Committee relating to Harpur's charity, the majority *then* ſtood in favour of the petitioners; but they informed the Committee, that they intended to object to many votes which had been received in favour of the petitioners. On this, the counſel for the petitioners proceeded to endeavour to add other votes to the poll which had been rejected by the returning officers, and then cloſed their caſe, by evidence tending to prove bribery on the ſitting members.

Then the counſel for the ſitting members went through their evidence and arguments on ſeveral new heads of objection.

The different points in this laſt part of the caſe, and the evidence and arguments concerning them, were as follow:

The counſel for the petitioners endeavoured to ſupport, and the counſel for the ſitting members objected to, the votes of,

VIth

(1) *Vide ſupra*, Caſe of Taunton, vol. i.

VIth Point.] 1. Perſons having received of a charity called *Hawes*'s charity.

VIIth Point.] 2. Perſons having received of a charity called *Welborn*'s charity.

VIIIth Point.] 3. The maſter and brethren of an hoſpital called St. *John*'s hoſpital.

IXth Point.] 4. *Freemen* who had received pariſh relief within a year before the election.

Xth Point.] 5. Freemen, who had an *inchoate right* to their freedom, but were admitted in a particular manner different from the cuſtomary mode of admiſſion for ſuch freemen, and within a year before the election.

(☞ There were ſix of this deſcription who had tendered their votes, and had been rejected.)

The nature of Hawes's charity appeared to be this. Certain lands were left by one Hawes for the uſe of the poor of the pariſhes of St. Mary and St. Paul in Bedford: of the yearly profits of this land two thirds are to be diſtributed yearly *in bread* to the poor of the pariſh of St. Paul, and one third to thoſe of the pariſh of St. Mary.

Welborn's charity was founded in the year 1716, when one Robert Welborn left a cloſe, now of the value of 4*l.* 10*s. per annum*, to the miniſters and *overſeers of the poor* of St. John's pariſh in Bedford, to be diſtributed to the poor on New-year's day. It appeared that the practice is to diſtribute it in ſums of three or four ſhillings to each perſon.

St. John's hoſpital was founded in the year 980, by one Robert de Parys, for ſix poor men to pray for his ſoul and the ſouls of ſeveral of his relations, and to attend divine ſervice. It was a ſort of chantry, and is now in every reſpect a corporation. The rector of the pariſh where it lies is maſter, there is a common ſeal, and the brethren, as they are called, are parties to all leaſes made of their land. Since the year 1606, in conſequence of an order of the King and Council, made upon a petition for that purpoſe, they receive each nine pence a week from the revenues of their land.

It was proved that uſage and reputation were in favour of the votes of thoſe three claſſes, and that they are often

often rated to the poor;—that the bread of Hawes's charity is moſtly received by wives and children.

As to the freemen rejected becauſe admitted within the year, although they had antecedent titles, it was proved, that the cuſtom of Bedford is to admit freemen, *having previous titles* at the court-leet that *honorary* freemen, on the contrary, are often admitted at a common-council, as ſuch admiſſion is not demandable of right, but is matter of favour in the corporation, and on ſuch occaſions there is often no enquiry or proof made of a previous title, even if the perſons admitted have it, they are underſtood to wave the benefit of that title, and are conſidered merely as *honorary* freemen.

It was contended on the part of the petitioners,

That, as to Hawes's and Welborn's charities, there could be no diſtinction made between them and Harpur's charity; that they are alike derived out of land, and appropriated to ſimilar uſes; that it would be a fraud and ſurprize on the perſons who had received them on the ſuppoſition that they would not thereby loſe their votes, having never heard that thoſe charities would diſqualify, to declare *them* now to be diſqualified, and thus deprive them of their franchiſe by an *ex poſt facto* deciſion. That no reaſonable perſon can ſuppoſe, that perſons previouſly entitled to vote, would have accepted either a ſixpenny loaf, or three or four ſhillings, if they had imagined that this would annul their votes. That, with regard to Hawes's charity, as it is generally given to women and children (1), it would be particularly unjuſt that their act in receiving it ſhould deſtroy the votes of their huſbands or fathers who might not be privy to their having received it. That, as to the brethren of St. John's hoſpital, they are a corporation, and have a *permanent* intereſt in what they receive from the profits of their land: That they are like fellows of colleges, and, like them, would be entitled to vote even at county elections, as deriving an income for life out of lands: That, if one of them were turned out, he might have a *mandamus* to reinſtate him: That what they receive, therefore, is of a certain and ſtable nature, and does not ſubject them to influence like the uncertain

(1) *Supra*, line 1 and 2.

uncertain fluctuating hopes of parish relief: That they may be compared to Chelsea and Greenwich pensioners; and that the former were holden, in the case of Taunton, not to be disqualified within the meaning either of the words "*alms*" or *charity*," by what they receive from the hospital (1).

(☞ They seemed to give up the votes of the freemen who had been made within the year, as being within the meaning of the statute of George the Third.)

As to the freemen who had received parish-relief within the year they *now* (2) argued,

That these words of the last determination, "*not receiving alms*," could not be carried back to *freemen* since the Committee had determined that the previous words "*being householders*," do not apply to them; and though alms, by the common law, disqualify men who acquire an accidental right to vote by *inhabitancy*, none of the advantages of a *franchise* purchased by a man, or by his parents, for money, or by serving an apprenticeship, can be afterwards annihilated by a change of situation and pecuniary circumstances.

On the head of bribery, some evidence was given to show that the corporation, when there was question of a certain gentleman's being a candidate, had required of him as a previous condition to his being supported by them, that he should deposit a considerable sum of money. But this was explained to have been intended merely as a security for the payment of the necessary expences of the election, and not as a corrupt consideration or gift for their benefit; and there was no proof that ever such a proposal had been made to the sitting members, or that any money had either been given or promised by *them*.

The counsel for the sitting members insisted,

That they still were at liberty to contest the right of men receiving any other character but Harpur's:

That

(1) Case of Taunton, *supra*, vol. i. *Nota*. In the report of that case, I have said this point was "*settled*" I should have said "*determined by the Committee*."

(2) *Vide supra*, p. 38.

That they might, and did ſuppoſe, that the Committee had decided *ſpecially* upon that charity, on the ground of its great value, which rendered the receiving it an object even to perſons in eaſy circumſtances. They then went over nearly the ſame ground of argument which they had formerly taken. They ſaid, That Welborn's charity is diſtributed by the overſeers of the poor; That it ſtands in the place of pariſh pay to thoſe who receive it; That *alms*, as the counſel for the petitioners had contended in the beginning of the cauſe, is a general common law diſqualification, if received within the year (1), and therefore affects perſons claiming to vote as freemen, as well as inhabitants; That it does not annihilate any part of their franchiſe, but only ſuſpends the exerciſe of their right of voting while they are in that dependent ſtate, when the law intends them to be incapable of giving a free ſuffrage.

There were ſome other votes objected to on both ſides, as given by perſons, who were not houſeholders, who lived in pariſh houſes, &c. and ſome of them were given up. ☞ It will be obſerved, that, with regard to theſe, the fact, not the law, was diſputed.

After the counſel on both ſides had finiſhed, which they did on Tueſday, the 21ſt of March, the Committee deſired that ſtates of the poll, and of the numbers of votes objected to on each of the different heads, ſhould be agreed on, and delivered in, by the agents on each ſide.

From thoſe ſtates it appeared,

1. That the original poll, including the honorary non-reſident burgeſſes and freemen, whoſe votes had been declared by the Committee to be legal, was,

For Sir William Wake . -	527
For Mr. Sparrow - - -	517
For Mr. Whitbread - - -	429
For Mr. Howard - - -	429

2. That, including all the votes which the counſel for the petitioners had endeavoured to eſtabliſh, the numbers would have been,

(1) *Supra*, p. 38.

For

For Whitbread - - -	611
For Howard - - - -	580
For Wake - - - -	541
For Sparrow - - -	530

3. That after ſtriking off thoſe who received Welborn's charity, the freemen receiving pariſh relief, thoſe who had been admitted to their freedom within the year, and the particular votes objected to as given by inhabitants not houſeholders, &c. the numbers would have ſtood,

For Whitbread - - -	568
For Wake - - - -	541
For Howard - - - -	537
For Sparrow - - - -	529

4. That, if perſons who received Hawes's charity had alſo been ſtruck off, the numbers would have ſtood,

For Wake - - - -	527
For Sparrow - - - -	519
For Whitbread - - -	467
For Howard - - - -	441

5. Or that, if thoſe votes had been left on the poll, and thoſe of the freemen who had received pariſh relief added, the numbers then would have been,

For Whitbread - - -	574
For Howard - - -	542
For Wake - - - -	541
For Sparrow - - -	530

As the different points in what remained of the caſe, after the deciſion concerning Harpur's charity, were not argued and determined ſeparately, the Committee did not communicate their ſeveral reſolutions on thoſe points to the counſel, but they are contained in the minutes taken by the clerk, and delivered to the parties, from whence I have tranſcribed them, *viz.*

1. The queſtion being put,

That

That the perſons who voted at the laſt election for Bedford having received Hawes's charity, were thereby diſqualified;

It was reſolved in the negative.

2. The queſtion being put,

That the perſons who voted at the laſt election for Bedford having received Welborn's charity, were thereby diſqualified;

It was reſolved in the affirmative.

3. The queſtion being put,

That the maſter and brethren of St. John's Hoſpital were diſqualified from voting at the election for Bedford;

It was reſolved in the negative.

4. The queſtion being put,

That the word "*alms*" in the reſolution of 1690, refers to burgeſſes and freemen, as well as to the inhabitants houſeholders of Bedford;

It was reſolved in the affirmative.

5. The queſtion being put,

That the ſix perſons who tendered their votes at the laſt election for Bedford, being admitted within the twelvemonth by the common-council, had a right to vote;

It was reſolved in the negative.

The Committee likewiſe reſolved,

That they would not reject any perſon's vote (not otherwiſe diſqualified) for receiving alms, provided he had not received the ſaid alms within the year (B).

On Thurſday, the 23d of March, the Committee, by their Chairman, informed the Houſe, that they had determined,

That Sir William Wake, Bart. was duly elected; and,

That Samuel Whitbread, Eſq. the petitioner, was duly elected, and ought to have beeen returned (1).

(1) Votes, p. 420, 421.

NOTES.

NOTES

ON THE CASE OF

BEDFORD.

PAGE 39. (A). On the 26th of April, Mr. Whitbread preſented to the Houſe, a petition of divers inhabitants, houſeholders of Bedford, ſetting forth; That the mayor, aldermen, and common-council had, at ſeveral times, aſſumed a power of making an unlimited number of burgeſſes and freemen, ſtrangers, and foreigners, who never ſerved any corporate office, exerciſed any trade, or contributed to any rate or aſſeſſment, within the town, for the ſole purpoſe of their voting at elections for members of Parliament; That particularly in the month of September, 1769, they had made upwards of five hundred, and a conſiderable number every year ſince; and that the like evil practice, if continued, would totally annihilate the ancient right of election to the petitioners, the whole number of inhabitants, houſeholders, who have a right to vote, being computed not to exceed five hundred and forty; praying, therefore, that the Houſe would grant ſuch relief as might be expedient for the preſent, and prevent the like practices for the future. Votes, P. 573, 574.

This petition was ordered to be referred to a Committee to enquire into, and ſtate the matter of fact to the Houſe.

On the firſt of May, Sir William Wake, now Mr. Whitbread's colleague, after complaining that the petition had been preſented by a ſurpriſe on him, and the non-reſident electors of Bedford, and that he had received no notice that ſuch a thing was intended, moved that the order for referring it to a Committee ſhould be diſcharged; but the queſtion being put on that motion, it paſſed in the negative. (Votes, p. 603, 604.) On the 17th of May, however, (Votes, p. 699,) nothing having been done by the Houſe in conſequence of a report which had been made by the Committee ſome time before, the conſideration of the report was put off for two months, before which time the Houſe was prorogued for the ſummer.

P. 46, 61. (B.) As a perſon who is at preſent in indigent circumſtances may afterwards become affluent or independent, and *vice verſa*, it cannot be ſuppoſed that the receipt of alms, or of any particular charity (in caſes where that diſqualifies) ſhould operate at an unlimited diſtance of time, nor on the other hand, that, where the right of election is in thoſe who pay ſcot and lot, or to church and poor, ſuch payments ſhould produce a qualification, though made at any remote period before the election. Some line muſt be drawn, in both inſtances, and that line, by the eſtabliſhed cuſtom of Parliament, ſeems to be one year before the election; unleſs in particular caſes, where, either by ſpecial uſage, a determination of the Houſe (as in the caſe of Reading, *ſupra*, p. 52), or an act of Parliament (as in London), the diſqualification by alms is extended to two years.

P. 52. (C). The counſel for the ſitting members were going to ſtate the nature of Mr. Bedford's charity, in Ayleſbury, from their briefs, but this was objected to, unleſs they would produce legal evidence of it. It is ſtated in the Journals.

"7 Feb. $169\frac{8}{9}$. The Committee reports, That it appeared "that John Bedford, by his will, made the 12th July, 9 Hen. "VII. allotted lands of about 120l. a year, for the repair of "the highways about Ayleſbury, and to be dealt in *alms*, to "blind people, crooked, ſick, and poor people. That, in "39 Eliz. there was an act of Parliament for ſettling this charity, by which the ſaid truſt is veſted in nine perſons, who "are made a corporation, and empowered to act in the diſpoſition of the ſaid charity, according to the will of Mr. Bedford, and are to have perpetual ſucceſſion, by the name of "the Surveyors of the highways of Ayleſbury, in the county of "Bucks. That this charity, accordingly, every St. Thomas's "day, is diſtributed by the feoffees, to the poor of Ayleſbury, "by two ſhillings, half a crown, or three, four, or five ſhillings "a piece, or ſuch ſmall ſums, and is commonly continued to "the ſame perſons for their lives, but that 'tis diſcretionary in "the feoffees to change the perſons as they think fit. And "that, for this charity, every three years they account to the "biſhop of Lincoln (1)."

Surely this entry in the Journals was evidence to be read to the Committee.

(1) Journ. vol. xii. p. 487. col. 1.

THE

XVI.

THE

CASE

OF THE BOROUGH OF

SUDBURY,

IN THE COUNTY OF SUFFOLK.

The Committee was choſen on Friday, the 17th of March, and conſiſted of the following Gentlemen.

Fred. Montagu, Eſq. Chairman,	Members for	High. Ferrers
Philip Yorke, Eſq.		Helleſton
Richard Benyon, Eſq.		Peterborough
Thomas Powys, Eſq.		Northampton.
Right Hon. Tho. Townſhend,		Whitchurch
Robert Vyner, Eſq.		Lincoln
George Byng, Eſq.		Wigan
Thomas Whitmore, Eſq.		Bridgenorth
Charles Morgan, Eſq.		Breconſhire
Sir Roger Moſtyn, Bart.		Flintſhire
Hans Sloane, Eſq.		Newp. Hants
Charles Dundas, Eſq.		Richmond
Nathaniel Ryder, Eſq.		Tiverton
NOMINEES.		
Of the Petitioners,		
James Grenville, Eſq.		Buckingham
Of the Sitting Members,		
Beaumont Hotham, Eſq.		Wigan

PETITIONERS.

Sir Walden Hanmer, Bart. on behalf of himſelf and Sir Patrick Blake, Bart. (abſent in the Iſland of St. Chriſtopher's.)

Certain Electors for the Borough of Sudbury.

Sitting Members.

Thomas Fonnereau, Eſq. Philip Champion Creſpigny, Eſq.

COUNSEL

For the Petitioners.

Mr. Lee, Mr. Murphy.

For the Sitting Members.

Mr. Cox, Mr. Wilſon.

THE CASE OF THE BOROUGH OF SUDBURY.

ON Saturday, the 8th of March, the Committee being met, the two petitions were read, containing, in ſubſtance, the ſame allegations, namely; That a great many legal voters, who tendered their voices for Hanmer and Blake, had been rejected, although they had been for many years in the poſſeſſion and exerciſe of their rights, to the knowledge of the mayor, and of Fonnereau, one of the ſitting members, in whoſe favour, and at whoſe requeſt, many of them had frequently polled at former elections; That many whoſe claim ſtood in the ſame predicament, had been admitted to vote for the ſitting members; That others who were not legally qualified, had alſo been admitted to vote for them; That the fair majority of legal votes was in favour of the petitioners; But, that William Strut, the mayor and returning officer, had acted partially and corruptly before, and during the poll, and had declared the ſitting members duly elected, and had returned them; And that money was given by the ſitting members, or their agents, by way of bribe of reward, to perſons who voted for them at the election (1).

The laſt determination of the right of election, being read, appeared to be as follows.

6 December, 1703. Reſolved, "That the right of "election of burgeſſes, to ſerve in Parliament for the bo-"rough of Sudbury in the county of Suffolk, is only in the

(1) Votes, 6 Dec. 1774, p. 31, 32.

" ſons of freemen, born after their fathers were *made* free,
" and in ſuch as have ſerved *ſeven years* apprenticeſhips, or
" are made freemen by *redemption* (2)".

Then the ſtanding order of 1735-6 was read (3).

At the opening of the cauſe, the counſel for the petitioners contended, that the reſolution of the 6th Dec. 1703, was merely explanatory of one of the 19th of January, 1702-3, in the following words;

Reſolved, "That the ſons of freemen, born after their
" fathers were *made* free, and thoſe that have ſerved ap-
" prenticeſhips in the borough of Sudbury, in the county
" of Suffolk, have a right to vote in the election of mem-
" bers to ſerve in Parliament for the ſaid borough, *without*
" *any admiſſion, in form, to their freedom*, or taking the oath
" of freemen (4)."

A great number of perſons, who tendered their ſuffrages for Hanmer and Blake at the election, were rejected, becauſe they did not produce evidence of their admiſſions to their freedom, enrolled upon ſtamps, in the books of the corporation. If the right of election was to be taken to be as declared in the reſolution of January, 1702-3, no formal admiſſion was neceſſary; that objection muſt fall to the ground; and it would only be requiſite, in order to eſtabliſh the votes of thoſe perſons, to ſhow that they came within the deſcription of one or other of the two claſſes mentioned in the reſolution.

They ſaid that this would appear to be the caſe from the hiſtory of the two reſolutions, as it is contained in the Journals; That the right of election for this borough was, during the laſt century, in a very precarious uncertain ſtate; That ſometimes the excluſive right was claimed and exerciſed by the magiſtrates, or governing part of the corporation, and, on other occaſions, the freemen at large were admitted to vote; That, in ſhort, every election was a ſtruggle, with various ſucceſs, between the former, who were called the *Bench*, and the latter, called the *Floor*; That, at the election in 1702, one Benjamin Carter, the mayor and returning officer, declared, in conſequence of an order he had obtained from the governing part of the

(2) Journ vol. xiv. p. 245. col. 1, 2.
(3) *Supra*, vol. i. p. 51.
(4) Journ. vol. xiv. p. 119. col. 2. p. 121. col. 1.

corpo-

corporation to oblige all perſons claiming votes to *enroll* themſelves, that no man ſhould be ſuffered to poll whoſe name was not enrolled according to that order, and for want of ſuch enrollment, rejected ſeveral who had voted, at previous elections, for thirty years backwards (1); That it was on the occaſion of a petition of the unſucceſsful candidate at that election, that the firſt of the two reſolutions was made; That the election being declared to be void (2), on the ground of bribery, a new conteſt enſued between the ſame parties, and was followed by a new petition of the former petitioner; That, in this ſecond cauſe, the *only* point was, Whether, according to the right of election declared by the firſt reſolution, thoſe who had ſerved *five* years as attorney's clerks, had a right to vote (3); and that the reſolution of 6 Dec. 1703, being made to decide that point, muſt, by the fair conſtruction, be conſidered, as merely an explanation of the former, as to *the number of years* neceſſary to ſuch an apprenticeſhip as would beſtow a right to vote, *that* having been left undefined in the firſt.

The counſel for the ſitting members inſiſted,

That the latter reſolution was to be conſidered as a *complete independent* determination; That there is no reference in it to the former, which in explanatory reſolutions there always is; And that, ſo far from being merely a commentary on the former, it declares the right of voting in a claſs of perſons not at all mentioned there (4); But that, if the reſolution of 6 Dec. 1703, is independent of the other, it is the laſt determination within the meaning of the ſtatute; That perſons, therefore, claiming to vote under that determination, muſt prove themſelves to be completely freemen, which they cannot be without admiſſion; and that the only legal evidence of admiſſion is the enrollment thereof upon ſtamps in the books of the corporation.

The counſel on each ſide having argued this point, were directed to withdraw; and after the Committee had deliberated ſome time among themſelves, they were called in again, and informed, by the Chairman, that the Committee had reſolved *(generally,)*

(1) Journ. vol. xiv. p. 119. col. 2.
(2) Journ. *loc. cit.* p. 121. col. 1.
(3) Journ. *loc. cit.* p. 244. col. 2.
(4) *Viz.* Freemen by redemption.

That the counſel for the petitioners ſhould produce evidence to ſhow by what right the rejected perſons claimed to vote.

After this preliminary deciſion, the whole caſe was gone into on the part of the petitioners.

They endeavoured to ſhow;

1. That *honorary* freemen, of whom a great number had polled for the ſitting members, had no right to vote;

2. That the perſons who had been rejected becauſe they did not produce the enrollment of their admiſſion upon ſtamps, had a right to vote;

3. That the mayor's conduct had been ſuch as merited the cenſure of the Committee, and the Houſe.

(☞ They ſtated that they could prove a very public diſtribntion of money among the voters for the two ſitting members *after* the election, but as they did not ſay they had any proof either of money being given, or promiſes of money being made by them *previous to*, or *during*, the election, the Committee *ſeemed* to think this would not affect their ſeats; and no evidence was gone into on this head.

The following facts were all admitted or proved.

1. On the firſt point.

Sudbury is a borough by preſcription. It was incorporated by Queen Mary, and began to ſend members to Parliament in the firſt year of Queen Elizabeth. From that time, the returns are without interruption.

The corporation conſiſts of a mayor, ſix aldermen, twenty-four capital burgeſſes, and an indefinite number of freemen.

Till the year 1772, there are not above five or ſix inſtances to be found in the books of the corporation, of perſons admitted to their freedom without any title acquired either by birth, ſervitude, or redemption. Thoſe inſtances are of men who were candidates to repreſent, or members for, the borough, and were admitted out of compliment; but who cannot be ſhown ever to have exerciſed any franchiſe as members of the corporation. They are all within the laſt hundred years.

In 1772, the governing part of the corporation, the majority being in the intereſt of Mr. Fonnereau, made an entry in their books (27 Feb.) importing, that they have power to admit men claiming by any of the above titles, and alſo gratuitouſly, or *by favour*, without any previous title, or conſidera-

consideration in money. Accordingly, the next day (28 Feb.) 170 were admitted at once, of whom 130 had no right either by birth, servitude, or redemption. Before that period, this power of making *honorary* freemen had never been exercised in the borough (except, as had been said, out of compliment to candidates or members) nor was it understood to exist.

2. On the second point.

The constant usage has been to permit persons having a title by birth to exercise all the rights of freemen *without any enrollment upon stamps*, and even without an entry of their admission in the books of the corporation. Those rights are, chiefly, the right of *turning on* their cattle on a common belonging to the corporation, the right of carrying on different trades in the borough, and the right of voting for members of Parliament.

None but the freemen have the right of *turning on* (as they call it), and, when the time for *turning on* comes, the mayor, town-clerk, and some others of the corporation, attend at the common-gate in a sort of court, and the freemen, with their cattle, pass in review before them. Books are kept of the proceedings at those courts, in which there are many entries like the following,

11 May, 1772, Ordered, "That the cattle, belonging "to the *freemen* of this borough be put on the common of "this borough," (on a day specified in the order.)

If any doubt arises about the freedom of any one, it is enquired into, and, until it is proved that he is entitled by birth, servitude, or redemption, he is not permitted to *turn on*.

Many freemen have not the right of *turning on*, but none but freemen can have that right. The price of freedom, by itself, when acquired by purchase, is less than the price of freedom and common united.

7 May 1730, Ordered, "That, *if A. B. can show that he* "*has the freedom of the town*, he shall have the freedom of "the common for six guineas."

The prices of the right of common are paid to the treasurer, and the surplus of the money, after defraying the necessary expences, is disposed of at the moot-hall, on a day fixed by the mayor, *to freemen not having cattle to turn on, and freemen's widows*. It is called *communage-money*, and generally amounts to about 2s. or 2s. 6d. a head.

Reputation

Reputation that the father, (at the time the ſon was born), was free of the borough, has always been conſidered as ſufficient evidence of the perſon himſelf being a freeman. When a man was formerly admitted, the cuſtom has been to give him a ſlip of parchment ſigned by the mayor, or town-clerk. This is called the docket of his freedom. But there are hardly any inſtances of its being ſtamped. There are ſeveral entries in the books, by which it appears, that men have been admitted to their freedom on its being proved that their fathers were free at the time of their birth, by the oaths of their neighbours, or when their names were found on the communage-books, or in old polls, without any enquiry being made whether there was any enrollment upon ſtamps of their admiſſion.

At the laſt election, 388 were rejected. The names of a great many of thoſe appear on the communage-books as exerciſing the right of common for above thirty years. By the parole teſtimony of one Griggs, a man of forty-nine years of age, who has been reſident all his life at Sudbury, and by a compariſon of the reſpective polls, it appears, that of the 388, 26 voted in 1734; 83 in 1747; 137 *in May* 1754; 187 in 1761; and 281 in 1768. In 1704, Griggs lived with an uncle, who took an active part in the election of that year. He himſelf was conſtable in 1747, and acted as check-clerk at the laſt election. He knows the major part of the rejected voters perſonally, and never heard any objection to their exerciſing every other franchiſe of freemen.

In 1762, the mayor, aldermen, and capital burgeſſes were enrolled upon ſtamps in the corporation books, but they never inſiſted, at that time, nor till ſeveral years, afterwards, that the other freemen ſhould be ſo enrolled; on the contrary, one Stockdale Clarke, who had acted as town-clerk from 1749 to 1771, ſaid; that when he firſt come into that office, he had propoſed to the corporation to have the freemen enrolled upon ſtamps, but that they told him the determination of the Houſe of Commons had rendered that unneceſſary; that he had conſulted ſome of the leading perſons in the town, who were not of the corporation, and they gave him the ſame anſwer; and that the officers of the Stamp-office having threatened him with a proſecution if he did not take care to have the admiſſions of the freemen enrolled on ſtamps, he had ſent them word,

that

that the corporation did not think there was any occaſion for it. This was alſo proved by Thomas London, an inſpector in the Stamp-office, who had formerly lived twenty-one years at Sudbury, had been mayor, and ſaid he did not recollect an inſtance of the formal admiſſion of a perſon bern the ſon of a freeman, but many of perſons becoming free by ſervitude or purchaſe.

In 1768 there was a conteſt between three of the preſent candidates,— the two petitioners and Mr. Fonnereau. The numbers, on that occaſion, ſtood—For Blake 618; Hanmer 526; Fonnereau 254. Although, as has been juſt mentioned (1), 281 of the perſons now rejected polled at that time; and Mr. Fonnereau petitioned; yet neither at the election, nor in his petition, was there any objection made to their votes, many of which were given for him. The chief ground of his petition was bribery. His counſel, indeed, called a witneſs to prove that ſeveral of Blake and Hanmer's voters were not legal freemen, as not having been admitted upon ſtamps; but the Houſe would not permit this evidence to be gone into, becauſe foreign to the allegations of the petition (2).

After that election, the governing part of the corporation determined to inſiſt that all freemen ſhould be enrolled upon ſtamps; and, in 1771, they fixed the 29th of October for receiving the claims of thoſe who deſired to be enrolled. On that day, the court being met for that purpoſe about 9 o'clock in the morning, ſeveral hundreds of people aſſembled. The firſt perſon who demanded to be enrolled, claiming on the ground of being the ſon of a freeman born after his father was made free, the town-clerk was ordered to ſearch the books to ſee if the father was enrolled upon ſtamps prior to the birth of the ſon, and no ſuch enrollment being found, he was rejected. The father was then dead, and had exerciſed all the franchiſes of a freeman during the whole of his life, which the claimant was prepared to prove. The refuſal to enroll this man produced a great clamour, and the mayor diſſolved the court; but the croud detained him and the other magiſtrates in the hall till 9 at night, when a ſort of compromiſe took place through the interpoſition of Hanmer, the mayor conſenting to enroll

(1) *Supra*, p. 70.
(2) Journ. vol. xxxii. p. 705. col. 1.

roll three that night, and to hold courts afterwards for the purpoſe of enrolling others. A propoſal was that day made to the claimants, that a ſelect committee of the magiſtrates ſhould be appointed to enquire into their titles, and make a report thereof to the whole body; but this was not accepted. Some of the perſons concerned in the detention of the mayor were proſecuted by information, and, on their trial at the aſſizes, were convicted. Afterwards a ſelect committee was appointed for the above purpoſe, the mayor and two capital burgeſſes to be a quorum. All the members of that committee voted for the ſitting members at the laſt election. At ſeveral ſubſequent courts holden for the purpoſe of enrollment, many of thoſe who had been rejected on the 29th of October, 1771, put in their claim again, and were again rejected on the ſame ground, and after a ſimilar enquiry, as before; particularly on the 28th of February, 1772. Of the number of 170 already ſtated to have been admitted on that day (1), 40 claimed by birth or ſervitude: they were friends of Fonnereau, and voted for him and the other ſitting member at the laſt election; and as to *them*, no enquiry was made in court into their titles. Of the whole number of 170, many were not preſent. They were propoſed in liſts of thirty and forty, and queſtions put and carried upon each entire liſt, that they ſhould be admitted and enrolled. Some of the magiſtrates were heard by the witneſſes to ſay, that they would enroll none but the friends of Fonnereau.

A *mandamus* was brought againſt the corporation by one Snee, to be admitted and enrolled as being the ſon of a freeman, born after his father was made free. The ſame attorney (Mr. Fonnereau's agent) conducted this caſe both for the plaintiff and defendants. He prepared the briefs, and inſtructed the counſel, on both ſides. On the trial, which came on before the Lord Chief Juſtice of the King's Bench at the ſittings after Trinity term, 1771, Snee only brought evidence to ſhew that he was the *grandſon* of a freeman, and did not go into any proof that his father was free, which he might have proved; a verdict was neceſſarily found for the corporation. This Snee was afterwards made an *honorary* freeman, and voted at the laſt election for Fonnereau and Creſpigny.

3. On

(1) *Supra*, p. 68, 69.

3. On the third point.

Juſt before the election, the mayor had a thouſand copies printed of an extract from the Durham act, 3 Geo. III. cap. 15. containing the clauſe diſqualifying freemen admitted to their freedom within the year, and mentioning the penalty of one hundred pounds inflicted by the ſtatute if they ſhall preſume to vote, *but omitting the exception in favour of perſons who have an inchoate title.* He had himſelf cauſed thoſe papers to be diſtributed among the perſons claiming to be enrolled. Some of them, taking the alarm, came to aſk his opinion, whether they might vote without incurring the penalty, and received for anſwer, that they certainly would be liable to it if they preſumed to vote, and, if not able to pay, muſt go to jail. Two perſons particularly ſwore, that it was this anſwer of his alone that prevented them from tendering their voices at the election.

The poll, as the town-clerk took it, by the mayor's directions, reduces the number of voters in the borough to about 253. At every former election ſince 1703 near 700 polled; Mr. Fonnereau himſelf had polled from 5 to 600 on former occaſions.

No evidence was produced, on the part of the ſitting members, to contradict the above facts; moſt of them were, in a manner, admitted. Their council ſeemed only to aim at ſhewing that, of the perſons exerciſing the right of common, many received alms; and that the votes of men receiving alms have never been allowed in this borough. That laſt fact was acknowledged to be ſo by ſome of the witneſſes called on the part of the petitioners.

COUNSEL for the petitioners.

Iſt Point.] That *honorary* freemen (that is, thoſe who have not acquired a title to their freedom by birth, ſervitude, or redemption,) cannot be legally made in Sudbury, according to the conſtitution of the borough, or, at any rate, that they have no right to vote in the election of members of Parliament, appears, both from the evidence which has been produced, and from the expreſs words of the laſt determination. It has been ſhewn that the books do not furniſh a ſingle inſtance of a perſon admitted a freeman, by favour of the corporation, till within a century; and the few examples within that time are of men to whom a nominal

a nominal freedom was given as a mere unſubſtantial compliment, and who, from their ſituation in life, muſt be preſumed never to have claimed or exerciſed any of the rights of freemen.

In all caſes, where it has been a queſtion, whether honorary freemen have, or have not, a right to vote, the Houſe of Commons has proceeded on the evidence of uſage. If, by the cuſtom of the place, it appeared that they always had voted, the Houſe, in determining the right of election, has employed ſuch general words as will comprehend them. If, on the contrary, the uſage was againſt them, the determination has been ſo expreſſed as only to extend to freemen entitled by birth, ſervitude, or redemption.

In the caſe of Cheſter, in 1747, the counſel for the petitioners inſiſted, "That the right of election was only in "ſuch citizens of the ſaid city as are inhabitants within "the ſaid city, or the liberties thereof, and *admitted to* "*their freedom within the city by birth, or ſervitude*, and not "receiving alms or any public charity." The counſel on the other ſide denied *that* to be the right, and ſtated it *generally* to be "In the freemen of the ſaid city (1)." They propoſed to prove, but it was admitted, that ſeveral *honorary* and non-reſident freemen had voted at the elections of mayors and ſheriffs, and had ſerved thoſe offices, and that *honorary* freemen had exerciſed trades in the city (2). On this the Houſe,

9 Feb. 1747-8, Reſolved, "That the right of election "of citizens to ſerve in Parliament for the city of Cheſter, "is in the mayor, aldermen, and common-council, of the "ſaid city, and in ſuch *of the freemen* of the ſaid city, "not receiving alms, as ſhall have been commorant with-"in the ſaid city, or the liberties thereof, for the ſpace "of one whole year next before the election of citizens "to ſerve in Parliament for the ſaid city (3)."

In this caſe, as there was evidence that honorary freemen had exerciſed the ſame franchiſes with thoſe who acquired their freedom by an antecedent title, or by purchaſe, the determination made uſe of general words under which they

(1) 2 Feb. 1747-8. Journ. vol. xxv. p. 498. col. 1.
(2) 9 Feb. Journ. vol. xxv. p. 504, 505.
(3) *Ibid.* p. 505. col. i. 2.

they are comprehended. But in that of Worceſter, which happened at the very ſame time, as there was no ſuch evidence in their favour, although the counſel for the ſitting member contended that the right was general, "in the *freemen*, not receiving alms (1)." The determination was,

11 Feb. 1747-8, Reſolved, "That the right of election "of citizens to ſerve in Parliament for the city of Wor- "ceſter, is in the citizens of the ſaid city, not receiving "alms, *and admitted to their freedom, by birth or ſervitude, "or by redemption*, in order to trade within the ſaid ci- "ty (2).

Theſe words are clearly excluſive of honorary freemen, or men made free gratuitouſly and without a previous title; but not more ſo than the words of the reſolution of the 6th of December, 1703, with regard to Sudbury (3). Indeed, as one of the parties, both in the caſe of Cheſter, and in that of Worceſter, contended for freemen in general, the difference in the language of the two determinations ſhows, that when the expreſſion "*freemen*" is uſed *generally*, without any qualification as to the mode of acquiring their freedom, there honorary freemen are meant to be comprehended; and, on the other hand, where ſuch qualification is ſuperadded, they are meant to be excluded. This alone is a demonſtration that, according to the meaning of the laſt determination, honorary freemen cannot vote for members of Parliament, at Sudbury.

(☞ This objection went to ninety-four perſons, who polled for each of the two ſitting members.)

IId Point.] If the reſolution of the 6th of December, 1703, had been intended to alter, or repeal, that of the 19th of January preceding, by which admiſſions in form were declared not to be neceſſary, as it followed it ſo recently, it would certainly have contained direct words expreſſive of ſuch intended alteration. That the univerſal and uniform ſenſe of the borough has been, that it did not alter or repeal it, is evident from the conſtant practice which has been proved to have obtained ever ſince.

But

(1) Journ. vol. xxv. p. 509. col. 2.
(2) Journ. ſame vol. p. 510. col. 1.
(3) *Supra*, p. 65.

But the perſons who were refuſed to be admitted to their freedom, and whoſe votes were rejected, becauſe they could not ſhow any admiſſions of their fathers enrolled upon ſtamps, are, independent of the words of the firſt reſolution, within the words and the meaning of the ſecond. According to thoſe words, it is not neceſſary to prove any admiſſion of their own, or to ſhow that they themſelves were *made* free. It is enough, that their fathers were, and they were ready to ſhow when they demanded to be enrolled, at the courts holden on the 29th of October, 1771 and afterwards, that their fathers had, before the birth of the ſons, and during the whole courſe of their lives, exerciſed and enjoyed all the franchiſes and privileges of freemen, as communage, trades within the borough, and the right of voting for members of Parliament; ſurely this was proof enough, that they (the fathers) had been *made* free. There is nothing concerning enrollment upon ſtamps neceſſarily implied in the expreſſion, "*made free.*" The mode of *making* freemen varies in different boroughs, and the conſtant practice in this borough has been not to require any former enrollment. Muſt we not infer, that the Houſe, in ſpeaking of perſons *made free*, meant to refer to the eſtabliſhed cuſtom of the place, however irregular that may now appear to have been?

As ſo much ſtreſs is laid on the enrollment upon ſtamps in the books of the corporation, as if that were the only legal evidence of admiſſions to freedom, it will be neceſſary to take a view of the progreſs and changes of the ſtamp laws, as far as they affect this queſtion.

The firſt of thoſe was the ſtatute of the 5th of William and Mary, cap. 21. It was entitled, "An act for granting to their Majeſties ſeveral duties upon vellum, parchment, and paper, *for carrying on the war againſt France*;" and it enacted, "That, for every ſkin, or piece of vellum, or parchment, and for every ſheet, or piece of paper, upon which any admiſſion into any corporation, or company, ſhall be engroſſed or written, the ſum of one ſhilling ſhall be paid (1), and that ſuch vellum, parchment,

(1) Sect. 3.

"parchment, or paper, ſhall be ſtamped (1)." This ſtatute was to remain in force four years, but the ſame duties were continued by ſtatute 8 and 9 of William III. cap. 20. §. 12.

The ſtatute of the 9 & 10 Will. III. cap. 25, added, to the former, a new duty of one ſhilling on admiſſions which were therefore to pay two ſhillings. Both by this ſtatute, and that of 5 William and Mary, it was enacted, That ſuch admiſſions ſhould not be pleaded, or given in evidence in any court, nor be holden to be good, in law, or equity, till they were ſtamped; and, if they had been written without a ſtamp, the duty, and a penalty of five pounds, were to be paid, and after this the ſtamp put upon them, before they could be pleaded, or given in evidence, or allowed to be good (2). By the act of the 9th and 10th Will. III. all inſtruments ſtamped under the former, (5 William and Mary) were to be called in, and ſtamped again with a ſecond ſtamp, and, by both, inſtruments already written, and not ſtamped at all, were to be brought to the office and ſtamped.

Thus the law ſtood on this ſubject, till the year 1765, when the act of the 5th of the preſent King made ſuch alterations as will appear by ſtating the words of that act.

5 Geo. III. cap. 46. §. 1. "Whereas great frauds "are committed in the ſeveral duties of one ſhilling re- "ſpectively impoſed (among other duties) on admiſſions "into corporations and companies, by an act of Parlia- "ment, made in the fifth and ſixth years of the reign of "their late Majeſties, King William and Queen Mary, "(intituled an act, &c.) and by another act of Parlia- "ment, made in the ninth and tenth years of the reign "of his ſaid late Majeſty King William the Third, (inti- "tuled, &c.) owing to the ſaid duties being charged "on the admiſſions, and not on the entries, minutes, or "memorandums, made of ſuch admiſſions in the court "books, rolls, or records, of ſuch corporations or com- "panies,—be it enacted—that from and after the fifth "day of July, one thouſand ſeven hundred and ſixty-five, "the ſeveral duties upon admiſſions into corporations and "com-

(1) Sect. 3.

(2) 5 Will. and Mary, cap. 21. §. 11. 9 & 10 Will. III. cap. 25. §. 59.

"companies, granted by the ſaid acts, ſhall ceaſe and "determine.

"§. 2. And that from and after (*the ſame date*) in lieu "thereof, the duty herein after mentioned be charged, "impoſed, and paid, throughout the kingdom of Eng- "land, dominion of Wales, and town of Berwick upon "Tweed; that is to ſay,

"For and upon every ſkin or piece of vellum, or parch- "ment, and for every ſheet or piece of paper, upon "which ſhall be ingroſſed, written, or printed, in the "court-book, roll, or record, of any corporation, or "company, any entry, minute, or memorandum, of any "admiſſion into any corporation or company, the ſum "of two ſhillings.

"And if any town-clerk, or other proper officer, ſhall "neglect or refuſe to make ſuch entry, minute, or me- "morandum, of ſuch admiſſion, upon the proper duty, "in the court-book, or on the roll, or record of ſuch cor- "poration or company, within one month after any per- "ſon ſhall be admitted into the ſame, he ſhall, for every "ſuch offence, forfeit the ſum of ten pounds."

The other proviſions relating to ſtamps in the former acts are re-enacted by this (1), but it is to be obſerved, that it does not, like the former, require *that former admiſſions* ſhould be re-ſtamped; or that they ſhould be entered in the books.

The greateſt part of the rejected voters were in the uncontroverted enjoyment of their freedom before 1765. They were not, therefore, called upon to prove their freedom, by ſtamped admiſſions, in the books of the corporation, and the objection made to them by the returning officer at the poll falls to the ground. As to them, the true evidence would be admiſſions on ſlips of parchment duly ſtamped, but that evidence the corporation took care ſhould never be forth-coming, becauſe they held it unneceſſary under the reſolutions of 1702 and 1703, to give admiſſions upon ſtamps. Slips of parchment, importing that the bearer was a freeman of Sudbury, but not on ſtamps, were the only inſtruments in uſe. In their books, however, relating to rights of common,

(1) Sect. 42.

common, they have kept annual lists of the freemen, who put their cattle on the common, and also of those freemen who, not having cattle, received their share of the commonage-money. Those books need not be stamped by any law whatever, and, therefore, may be read in evidence. To this no reasonable objection can be made, nor to the parole testimony which has been given before the Committee. It has never been determined, that, according to the stamp laws, when no admissions on stamps are to be found, other evidence shall not be admitted to prove a man to be a freeman.

The general rule of law requires that evidence shall not be admitted of any thing of which better evidence might have been procured, and is not produced; but, when what would have been better evidence, if it could have been procured, cannot be found, it is also a rule of law, that the next best evidence shall then be admitted. And this rule, being derived from the principles of common sense, is not peculiar to the laws of this country. It is a rule of the civil law, with which one of the sitting members must, from his profession (1), be acquainted. On the part of the rejected voters, the words of Cicero (no mean authority in that law) on behalf of a client whose case was very similar to theirs, might have been used with great propriety. The admission of Archias the poet, to the freedom of the city of Heraclea, being called in question, he was ready to prove it by the same sort of evidence which the freemen of Sudbury offered to produce, but was told that this was not the best evidence, and that he must show the enrollment of his admission in the books of the city, although it was notorious that those books had been consumed by fire, and did not exist, on which Cicero, who pleaded his cause, observed, "*Hic tu tabulas Heraclienſium deſideras, quas, Italico bello, incenſo tabulario, interiſſe ſcimus omnes. Eſt ridiculum, ad ea, quæ habemus, nihil dicere; quærere quæ habere non poſſumus.*"

If a man could, in no instance, prove his freedom, but by showing a stamped admission in the corporation books, it would be in a candidate s power, after having gained the good wishes of the town-clerk to engage him not to enter the admissions of those who were not likely to befriend him,

(1) Mr. Crespigny is King's Proctor.

him, and at the moderate risk of ten pounds he could insure him against any consequences of his refusal so to do in any particular instance.---Where the numbers run near, a very few ten pounds would secure a majority.

But, from the titles, and the whole tenour of the stamp acts, it is obvious that they were meant but as revenue laws, and not intended to affect or stop the ordinary course of legal evidence. This is so much the case, that if you pay the penalty, and produce a certificate thereof, the entry of admission itself may be given in evidence although not stamped, as appears from the case of the King against Reeks, reported by Lord Raymond (1).

By the statute of 17 George II. cap. 3. § 1. it is enacted, "That the churchwardens and overseers shall cause publick "notice to be given in the church, of every rate for relief "of the poor, allowed by the justices, the next Sunday "after such allowance; and no rate shall be reputed suffi-"cient to be collected, till after such notice given." Yet it has been determined that a person paying under a rate, which never was so published, shall nevertheless gain a settlement (2). The principles of that determination will, by analogy, apply to the present case, since it shews that, where particular solemnities are enacted for particular purposes, as, with regard to stamps, for that of securing the payment of a branch of the revenue, and, with regard to the publication of rates, for that of general notoriety, although the legislature may have enforced the performance of such solemnities, by depriving the person or persons neglecting them of the use which might otherwise have been made of the thing on which they ought to have been employed, yet the want of those solemnities is not to annihilate titles or rights acquired, and capable of proof, independent of them. On the whole, all the operation of the stamp laws is, that, if an instrument or entry of admission is not stamped (or at least the penalties not paid) shall not be of any advantage to the person offending against them, in establishing his right of freedom. This was sufficient, and the legislature does not go farther, and say, that such person

(1) 2 Lord Raym. p. 1446, line 9, from the bottom of the page.

(2) *Quære.*

ſon ſhall not be ſuffered to prove his right by any other evidence.

If, notwithſtanding what has been ſaid, it were ſtill to be thought, both, that perſons claiming a right to vote as being ſons of freemen born after their fathers were made free, muſt *themſelves* have been made free, and that the only legal evidence that they *have*, is their admiſſion enrolled upon ſtamps, ſtill, on the cleareſt principles of law, the perſons rejected at the laſt election were entitled to vote. When they demanded to be enrolled they offered to ſhew that, when they were born, their *fathers* were free, and that they died in the exerciſe of all the rights of freemen. Surely, after ſuch a length of time, *their* being freemen was not to be conteſted. The law would *preſume*, with regard to them, enrollment upon ſtamps, if eſſential, and every other neceſſary form. The court of King's Bench never would ſuffer the right to a franchiſe to be queſtioned, upon the ſuggeſtion of ſo ſtale a defect of title. In the caſe of the King againſt Stevens, that court unanimouſly refuſed to grant an information, becauſe the perſon againſt whom it had been moved for had been in poſſeſſion for twenty-nine years (1); and, ſince that caſe happened, they have laid down a rule, never to grant an information in the nature of *Quo warranto* againſt a corporator *de facto*, if he has been twenty years in the undiſturbed enjoyment of his franchiſe (2). If, therefore, the title *to be admitted* of thoſe who claimed by birth, was not to be queſtioned, if they could ſhow that at the time of their birth their fathers were in poſſeſſion of the franchiſes of freemen, and ſo continued till their death, if they were ready to prove this, but were not permitted, and if, upon this legal ground, they demanded to be admitted and enrolled upon ſtamps, and were refuſed, they are to be conſidered as if they had been in fact admitted and enrolled, as to the right of voting either at corporation elections, if, by the conſtitution of the borough, they have any ſhare in them, or for members of Parliament; and, having tendered their votes at the laſt election, they are entitled to be put upon the poll. This equitable doctrine has been recognized and eſtabliſhed, with regard to the election of mayors, in the

(1) 1 Burr. p. 433. Michaelmas 31 Geo. II.
(2) *Vide ſupra*, Caſe of Helleſton, p. 3, 4.

caſes of the King *v.* Oſborn, and Auſtin *v.* Oſborn, Trin. 2. George the Firſt (1), and, with regard to the election of members of Parliament, in numberleſs inſtances to be found in the Journals, but, particularly, in the caſe of Shrewſbury, which was determined a few days ago (2).

The palpable colluſion in the ſham *mandamus*, nominally brought by Snee, but conducted by the agent for his pretended antagoniſts, is the ſtrongeſt proof that they and their adviſers knew that the law was againſt them.

As to 137 of the rejected voters, it has been proved, by the teſtimony of Griggs, and by the polls, that they have been in the poſſeſſion and exerciſe of the franchiſe of voting as freemen ever ſince May 1754 (3), which is more than twenty years previous to the laſt election. Their right therefore could not have been queſtioned at the time of the election even in Weſtminſter-hall, ſince the rule which has been juſt mentioned had attached upon them, and this Committee will not ſuffer rights to be diſputed before them, which cannot be attacked in the ordinary courſe of law. The votes of thoſe 137 perſons muſt therefore, at all events, be added to the poll, and they alone, independent of the others, are ſufficient to give both Sir Walden Hanmer and Sir Patrick Blake a great majority over the ſitting members.

IIId Point.] The moſt unjuſtifiable behaviour of the mayor, in garbling the ſtatute of George the Third, and in deceiving the electors, in order to perſuade them not to tender their votes, while it proves that he knew that, if tendered, they ought to be received, convicts him of ſuch intentional and criminal partiality, as calls for a degree of cenſure and puniſhment ſufficient, by the example, to deter others in the like ſituation, from practices of ſo dangerous a tendency (A).

The counſel for the ſitting members contended,

That, as to the admiſſion of *honorary* freemen, the magiſtrates being allowed to have a right of ſelling, muſt likewiſe have a right to give away the freedom of the town and common, the one neceſſarily comprehending the other.

That,

(1) Comyn's Rep. 240, 243.
(2) *Vide ſupra*, vol. i.
(3) *Supra*, p. 70.

That, as to the inference that perſons were freemen, and entitled to vote, from their names appearing on the communage-books as having received the communage-money, it was ſo far from fair or concluſive, that widows, who as women cannot exerciſe any of the rights of freedom, appear on thoſe books. That, on the contrary, the communage-money was to be conſidered as a ſort of charity, of the nature of alms, and that, as ſuch, by the common law of Parliament, the receipt of it had diſqualified thoſe who did receive it, even ſuppoſing their votes otherwiſe to have been good.

But they chiefly relied on their conſtruction of the ſtamp-laws, by which they contended, that nothing but ſtamped admiſſions could be legal evidence of a perſon's being a freeman.

In reply, the Counſel for the petitioners ſaid, on the queſtion concerning the honorary freemen,

That, though it may be true that where a man can ſell a thing *as his own*, he may confer it gratis, yet this will not apply to the ſelect part of a corporation, who, in admitting to the rights of common, and of carrying on trades in a borough, act only as truſtees for the corporate body at large. That their power of diſpoſing of thoſe rights for a conſideration in money, which counterbalances to thoſe already poſſeſſed of them what they loſe by their being communicated to a greater number, is far from involving in it a power of diminiſhing the value of thoſe rights to the ſubſiſting freemen, by an encreaſe of number without any equivalent or compenſation.

That, as to the diſtribution of the communage-money, it had been proved, that, by the cuſtom of the borough, it is given only to freemen, and freemen's widows. That all the men, therefore, who appear by the books to have received it, muſt be conſidered as freemen, and that without going into the litigated queſtion of the common law diſqualification by alms, the communage-money can never be conſidered as alms; that it is the property of the perſons to whom it is paid, purchaſed by themſelves, or their forefathers who firſt acquired the freedom of the borough; and that it is given as an equivalent to thoſe, who, not having cattle of their own to turn on, cannot enjoy the privilege of the common in that way.

During the courſe of the cauſe, the counſel for the petitioners propoſed to call a witneſs, to prove a converſation of one Delande, an alderman of Sudbury; on a ſuggeſtion that Delande himſelf could not be found to be ſerved with the Speaker's warrant.

This was objected to, and the point being argued,

The Committee, after clearing the court,

Reſolved, "That the counſel ſhould not be permitted to "go into this evidence."

After the Committee had ſettled their opinion among themſelves with regard to the merits of the election, before they communicated their determination to the Houſe, they ordered Strut, the mayor, and all the agents and perſons belonging to Sudbury who happened to attend, to be called in, and the Chairman, by their direction, publicly reprimanded Strut for his conduct at the election. He told him, That, by publiſhing a partial, mutilated extract from the ſtatute of George the Third, he had converted what was deſigned by the legiſlature for the moſt equitable purpoſes, to ſerve the worſt: That the object of that ſtatute was to ſecure men, poſſeſſed of an eſtabliſhed right to vote, in the ſubſtantial and effectual exerciſe of that right, by preventing their ſuffrages from being overpowered by an influx of new voters, unconnected with the borough, and made ſuch merely to ſerve a particular jobb: But that he had falſely held out its penalties to perſons who had an eſtabliſhed right, in order to deter them from exerciſing it. That the Committee had it in their power to report his conduct, and expoſe it to the juſtice of the Houſe (A), but they hoped a ſenſe of their lenity, and his own guilt, would be ſufficient, in future, to prevent him from acting ſuch a part, if ever he found himſelf in a ſituation ſimilar to that in which he appeared at the laſt election.

The numbers on the returning officer's poll ſtood as follow:

For Fonnereau, - - - - - - - - -	181
For Creſpigny, - - - - - - -	179
For Hanmer, - - - - - - -	74
For Blake, - - - - - - -	73

94 of the voters for the ſitting members were objected to as honorary freemen. If the petitioners had only ſucceeded on that point, the majority would have ſtill been againſt them; for Fonnereau would have remained with 87 voi-

all-

and Creſpigny with 85. If, therefore, the Committee had thought, that admiſſions upon ſtamps, in the corporation books, were neceſſary to eſtabliſh the right of voting to *all* thoſe who had been rejected, they could not decide in favour of the two petitioning candidates.

Of the 388 who were rejected, 26 were proved to have polled at every former election ever ſince 1734 (1). If we add thoſe to the votes for Hanmer and Blake, deducting at the ſame time the honorary freemen from thoſe for the two ſitting members, the majority will then be in favour of the two former, the numbers ſtanding thus: For Hanmer 100; for Blake 99; for Fonnereau 87; for Creſpigny 85. It was, therefore, *poſſible* that the deciſion ſhould be in favour of Hanmer and Blake, the Committee holding the honorary freemen's votes to be void, and of the 388 rejected, only the 26 above-mentioned to be good. But every argument and principle in ſupport of thoſe 26, applies equally to all the 137, (of which they make part,) who have been polled ever ſince May, 1734, that is, above twenty years before the laſt election (1).

The Committee therefore, in order to determine in favour of Hanmer and Blake, muſt have conſidered all the 137 as good votes, and the addition of them, without deducting the honorary freemen, would turn the majority conſiderably on the ſide of the petitioners; for the numbers would be, for Hanmer 211; for Blake 210; for Fonnereau 181; and for Creſpigny 179. Hence it follows, that a deciſion for Hanmer and Blake only *neceſſarily* required the Committee to be of opinion, "That perſons "who derived their claim to their freedom from the an- "tecedent title of birth, who had exereiſed all the rights "of freemen, and that of voting for members of Par- "liament among the reſt, for twenty years and upwards "before the laſt election, who had demanded to be en- "rolled, (and offered to prove that at their birth their "fathers exerciſed and enjoyed the rights and franchiſes "of freemen,) but were refuſed, had a right to vote, "though they could not produce evidence of their ad- "miſſion enrolled upon ſtamps."

On

(1) *Supra*, p. 70.

On Wednesday, the 22d of March, the Committee, by their Chairman, informed the House, That they had determined,

That Sir Walden Hanmer, Bart. and Sir Patrick Blake, Bart. were duly elected, and ought to have been returned (1).

(1) Votes, p. 407, 408.

NOTES

NOTES

ON THE CASE OF

SUDBURY.

PAGE 82, 84. (A.). The following caſe was very much in point to the conduct of the returning officer. In 1705, on occaſion of an election, the mayor of Norwich had publiſhed a bye-law, made at an aſſembly held in Norwich, 28 Oct. 1640, enacting, That any one that ſhould give his voice for any man, not free, to be choſen citizen for the Parliament, ſhould forfeit, to the uſe of the poor, five pounds, or ſuffer impriſonment (1). The Houſe, on this, (6 Dec. 1705,) Reſolved, "That William Blyth, Eſq. late mayor of the city of Norwich, by "*printing and publiſhing a pretended bye-law*, made in the year "1640, contrary to *Magna Charta*, in order to terrify the "electors of the ſaid city from free and impartial voting in the "late election of members to ſerve in Parliament for the ſaid "city, is guilty of an illegal and arbitrary proceeding."

And ordered, "That the ſaid William Blyth be, for his "ſaid offence, taken into the cuſtody of the Serjeant at Arms "attending this Houſe (1)."

(1) Journ. vol. xv. p. 55. col. 2. p. 56. col. 1.

(2) Journ. vol. xv. p. 56. col. 1, 2.

XVII. THE

XVII.

THE

CASE

OF THE DISTRICT OF

WIGTOWN, WHITEHORN, NEW GALLOWAY, and STRANRAER,

In SCOTLAND.

The Committee was chosen on Tuesday, the 21st of March, and consisted of the following Gentlemen.

Sir Tho. Clavering, Bart. Chairman.	Members for	Durh. county
John Tempest, Esq.		Durham
Christopher Griffith, Esq.		Berkshire
John Dyke Acland, Esq.		Callington
Hon. Thomas Lyon,		Aberdeen, &c.
Charles Ogilvy, Esq.		West-Looe
William Weddel, Esq.		Malton
Sir Cecil Wray, Bart.		East-Retford
Hon. Charles Finch,		Castle-Rising
Joseph Martin, Esq.		Tewkesbury
Hon. John Vaughan,		Berwick
Earl of Fife,		Bamfshire
Lord Adam Gordon,		Kincardineſh.
NOMINEES.		
Of the Petitioners,		
John Burgoyne, Esq.		Preston
Of the Sitting Members,		
Solicitor General of Scotland.		Edinburghſh.

PETITIONER.

Henry Watkin Dashwood, Esq.

Sitting Member.

William Norton, Esq.

COUNSEL

For the Petitioner.

Mr. Macdonald, Mr. Elliot.

For the Sitting Member.

Mr. Crosby, Mr. Lee (A).

THE

CASE

Of the DISTRICT of

WIGTOWN, &c.

WHEN the Committee met, on Wedneſday, the 22d of March, Mr. Daſhwood's petition was read, which, as it contains the general ſtate of his caſe, and will ſerve as a precedent for petitions from diſtricts of boroughs in Scotland, it may be proper to inſert at length.

"To the Honourable the Commons of Great Britain, in "Parliament aſſembled, the Petition of Henry Wat-"kin Daſhwood, Eſq. humbly ſheweth,

"That your petitioner, and William Norton, Eſq. were "candidates at the laſt election of a member to ſerve in "Parliament for the diſtrict of the borough of Wigton, "Whitehorn, New Galloway, and Stranraer, in Scotland, "which election was had on Monday, the 31ſt day of Oc-"tober, 1774; That, at the ſaid election, the delegates for "the boroughs of Wigton, Whitehorn, and Stranraer, du-"ly choſen, and appointed for thoſe three boroughs, met "at New Galloway, the preſiding borough, and that "Alexander Ferguſon, Eſq. choſen and appointed dele-"gate for the borough of New Galloway, *abſented* himſelf "from the ſaid election, having pretended to reſign the "office of delegate; That John Newall, Eſq. pretending "to have been duly choſen delegate for the ſaid borough "of New Galloway, upon ſuch pretended reſignation of "the ſaid Alexander Ferguſon, Eſq. was admitted to vote,

"and

" and, accordingly, voted for the ſaid William Norton, " Eſq. But your petitioner, having had the votes of the " delegates of the boroughs of Wigtown, and Whitehorn, " at the election aforeſaid, and the ſaid William Norton " the vote of the legal delegate of the borough of Stran- " raer only, (the pretended delegate, John Newall, Eſq. " not having any legal authority to to vote at ſuch election) " had, thereby, a majority of legal votes; notwithſtand- " ing which, the ſaid William Norton had been returned " as the burgeſs duly elected, to ſerve in Parliament for " the aforeſaid diſtrict of boroughs, to the manifeſt injury " of your petitioner. Your petitioner, therefore, hum- " bly prays this honourable Houſe to take the premiſes in- " to their conſideration, and grant him ſuch relief, as to " this honourable Houſe ſhall ſeem meet (1)."

There were two queſtions in this caſe.

1. Whether Mr. Newall was duly choſen a delegate, for the borough of New Galloway, and was capable of voting at the election of the member to ſerve in Parliament for the diſtrict. The ſuppoſed illegality of the appointment, and of the vote of Newall, was the only ground of Mr. Daſhwood's claim to the ſeat.

2. Whether a perſon, not a burgeſs of any of the boroughs compoſing a diſtrict, is capable of being elected a burgeſs, to ſerve in Parliament for that diſtrict.——Mr. Daſhwood was not a burgeſs of either of the four boroughs for which he was a candidate, at the time of election; and this objection to his eligibility was taken, on the trial of the cauſe, by the counſel for the ſitting member.

To render the arguments in this caſe more intelligible, it will be proper to premiſe a brief account of the mode of electing members for the boroughs in Scotland, as it has been eſtabliſhed by the ſeveral acts of Parliament, ſince the union of the two kingdoms.

By an act of the Scotch Parliament, of the 5th of February, 1707-8, cap. 8. (2) declared to be equally valid as if it had been inſerted in the treaty of union, there are to be, of the forty-five repreſentatives of Scotland, in the Houſe of Commons (to which number they are confined by the

(1) Votes, Dec. 6. p. 32, 33.

(2) Ruffhead's Statutes, vol. iv. p. 232, 233, 234. Scots Acts, ſmall edit. vol. iii. p. 736, &c.

the 22d article of that treaty) fifteen choſen by the royal boroughs. Of theſe, one is choſen by the city of Edinburgh, and one by each of fourteen diſtricts, into which, by that act, the remaining boroughs are divided (B). Each borough of a diſtrict receives a precept from the ſheriff or ſteward, in whoſe juriſdiction it lies, within four days after he receives the writ of election, by which precept the magiſtrates are commanded to elect a commiſſioner (or delegate) according to the manner in which they formerly elected the members they ſent to the Scotch Parliament.

The delegate, when elected, has a regular commiſſion given him, and all the delegates meet on the day appointed for chooſing the member of Parliament, at one of the boroughs in the diſtrict. That day muſt always be the thirtieth after the teſte of the writ, unleſs that happen to be a Sunday, in which caſe the election muſt be on the thirty-firſt day after the teſte of the writ (1).

The borough where the election is made is called the preſiding borough. This each borough is, in its turn, from one general election to the next, in the order preſcribed by the Scotch act before mentioned (B). If a vacancy happens in the interval between two general elections, the borough which preſided at the general election immediately preceding (2), or (as it is expreſſed in the ſtatute, and which amounts to the ſame thing) the borough which preſided at the election of the member whoſe ſeat has become vacant, is to preſide at the election conſequent upon ſuch vacancy.

The whole power of election is devolved upon the delegates, ſo that they may vote for whom they pleaſe, and are neither bound to receive, nor follow, any inſtructions from their reſpective conſtituents (C).

In the event of an equality of voices, the delegate of the preſiding borough has a caſting vote, beſides his vote as commiſſioner for his own borough (3).

If the commiſſioner from the preſiding borough be *abſent* from the meeting for the election of the burgeſs to ſerve in Parliament, or refuſe to vote, the commiſſioner from the borough which was the preſiding borough at the laſt election,

(1) 6 Anne, cap. 6. § 5.
(2) Same ſtat. and ſect.
(3) Sco. Stat. 1707-8. cap. 8.

tion, and if he alſo be abſent, or refuſe to vote, the commiſſioner from the borough, which was the preſiding borough, at the election immediately preceding the laſt; and in caſe he be abſent, or refuſe to vote, the commiſſioner from the borough, which was the laſt preſiding borough but two, has, beſides his own vote, the caſting or deciſive vote (1).

The time for the election of the delegates is preſcribed by the ſtatute of the 7th of George the Second, cap. 16. § 5. That ſection, which is very material in the preſent caſe, is in the following words.

" Be it enacted, that the ſeveral ſheriffs and ſtewards in " Scotland ſhall, within the ſpace of four days after the " writ ſhall come to their hand, iſſue their precepts to the " ſeveral boroughs within their juriſdiction to elect their " delegates, and ſhall cauſe the ſame to be delivered to the " chief magiſtrate of ſuch borough reſiant in the borough " for the time being; and that ſuch chief magiſtrate, to " whom ſuch precept ſhall be delivered, ſhall be delivered " ſhall, *within two days* after his receipt of the ſame, call " and ſummon the council of the borough together, by gi- " ving notice perſonally, or leaving notice at the dwelling- " place of every counſellor then reſiant in ſuch borough, " which council ſhall then appoint *a peremptory day for the* " *election of the delegate; but two free days ſhall intervene be-* " *twixt the meeting of the council which appoints the day of* " *election of the delegate, and the day on which the election of* " *the delegate is to be made.*"

The facts of the caſe, as they were taken from the entries in the corporation-books of New Galloway, and admitted by the counſel on both ſides, were as follow.

In conſequence of the precept of the ſteward-ſubſtitute of the ſtewartry of Kircudbright (within whoſe juriſdiction the borough of New Galloway is ſituated (B), which precept was delivered to the proper officer in the borough, on the 15th of October, the council was ſummoned, and met on the 17th, agreeable to the proviſion of the ſtatute; and they appointed the 22d as the *peremptory day* for the choice of their delegate. On that day (the 22d) they choſe Mr. Ferguſon. His commiſſion was regularly made out, and he accepted it.

The

(1) 16 Geo. II. cap. 11. § 28.

The day for electing the member of Parliament was the 31ſt of October, being the thirtieth day after the teſte of the writ.

On the morning of that day, a letter from Mr. Fergusſon was preſented to the council of the borough of New Galloway, then aſſembled, dated at Edinburgh which is at the diſtance of about eighty miles, purporting; that it was impoſſible for him to attend the election, and declaring, therefore, that he thereby reſigned his commiſſion, and deſiring them to chooſe another delegate in his place. His commiſſion, which accompanied the letter, was alſo produced. The council unanimouſly reſolved to accept of the reſignation, and to proceed to a new election of a delegate; which they accordingly did, and John Newwall, Eſquire, was unanimouſly choſen (as Ferguſon had been), and by the ſame perſons who had elected Ferguſon; they being all preſent, at both elections. A commiſſion was made out in form to Newall, and accepted.

At the election of the member of Parliament he appeared, and, producing his commiſſion, acted as preſiding officer, and gave his voice for Mr. Norton. The delegate for the borough of Stranraer voted alſo for Norton. The other two gave their ſuffrages for Daſhood; ſo that there was an equality of voices. Upon this, Newall gave his caſting vote for Norton, and the town-clerk of New Gallow, who was by law the returning officer (1), made a returnn of Norton as the perſon duly elected.

As to the ſecond queſtion;

It was admitted that Mr. Daſhwood was not a burgeſs of any of the four boroughs at the time of the election. The counſel for the ſitting member ſtated, that he (the ſitting member) was a real (not honorary) burgeſs of one of the boroughs at the time of the election; and the counſel on the other ſide ſaid they were not inſtructed to the contrary.

COUNSEL for the petitioner.

Iſt Point.] The election, commiſſion, and vote of Mr. Newall were all void.

The precept for the election of a delegate for the borough

(1) 16 Geo. II. cap. 11. § 30.

rough of New Galloway, having been completely obeyed, by the choice of Mr. Ferguſon, became, thereby, *functum officio*, and the power which the magiſtrates derived under it, having been exerciſed by ſuch firſt choice, was entirely at an end.

A delegate being a mere creature of the acts of Parliament, his election muſt be, in every reſpect, agreeable to the proviſions of theſe acts, otherwiſe he cannot exiſt as ſuch.

The great object of the ſtatute of the 7th of George the Second was to prevent a ſurprize on the different members of the town-council who had a right to vote at the election of their delegate, by giving them ſufficient notice, and time to attend. Hence it enacted, that two *free* days ſhould intervene, between the meeting for naming the day of the election; and the day of ſuch election; that is, two entire days, excluſive of thoſe on which the reſpective meetings of the council are holden. Here there was no previous notice of the pretended election of Newall. However fair the proceeding may have been in this particular inſtance, the precedent, if it were to receive a ſanction from the deciſion of the Committee, would open the door to manifeſt fraud upon future occaſions; ſince, by taking care to propoſe for the firſt delegate a man agreeable to the majority of the council, but whoſe intention to reſign was predetermined, the chief magiſtrate on the morning of the election of the member, would have an opportunity of proceeding, without any warning, and with a packed number of counſellors, to chooſe a new delegate, contrary to the ſenſe and inclinations of the majority of the electors.

Ferguſon, notwithſtanding his pretended letter of reſignation, continued ſtill to be the legal delegate for the borough. This office is like that of a member of Parliament, who has a duty and ſervice impoſed upon him by his conſtituents, and cannot reſign. The letter, therefore, which was ſent by Ferguſon to the borough, can only be conſidered as a refuſal to be preſent, or to vote at the election of the member for the diſtrict, which brings the caſe exactly within the proviſion of the ſtatute of the 16th of the late King (2).

COUNSEL

(2) 16 Geo. II. cap. ii. § 28. Vide ſupra, p. 92.

COUNSEL for the ſitting member.

The ſtatutes relied on, by the counſel on the other ſide, are merely *directory*, and not mandatory, (D) and therefore acts, ſubſtantially right, are not neceſſarily void, becauſe, in doing thoſe acts, the particular modes of proceeding chalked out by the ſtatutes, are not followed in every circumſtance.

By the ancient ſtatute law of England, and by the writ to the ſheriff, the election of members to ſerve in Parliament for that part of the kingdom, is directed to be made by perſons preſent at the proclamation of the writ: but this is ſeldom complied with, and in the late caſe of Briſtol (1), it was proved that it is not neceſſary.

By a ſtatute of the 7th and 8th of William the Third, it is enacted, That, upon the election of any knight of the ſhire, the ſheriff ſhall hold his county-court for that purpoſe, at the moſt public and uſual place of election, and where the ſame has moſt uſually been for forty years laſt paſt (2). Yet, on the occaſion of a controverted election of a knight of the ſhire for the county of Pembroke, altho' the uſual place of election had been Haverfordweſt, and the ſheriff had, in that inſtance, proclaimed it at Pembroke, and held it there, that deviation from the direction of the ſtatute, was not thought to be fatal to the election. *Quære.* (E) (1).

If Ferguſon had died, or an act of attainder had paſſed againſt him, in the interval between his election and that of the member of Parliament, was the borough, on that account, to forfeit its ſhare in the choice of a repreſentative? This would be contrary to the known and juſt rule of of law, that none ſhould ever be deprived of their franchiſes by the act of God, or the fault of another.

This Committee, being a court of ſupreme ultimate juriſdiction, without appeal, like all courts of the ſame kind, cannot do ſubſtantial juſtice unleſs it be conſidered as a court of equity, as well as of law. In the former capacity it

(1) *Supra*, vol. i.
(2) 7 and 8 Wil. III. cap. 25. § 3.
(3) See Journ. vol. xxxii. p. 461. col. 2. 10 Jan. 1770. and ſame vol. p. 905. col. 2.

it ought to follow the ſenſe and ſpirit of the ſtatutes rather than the ſtrict words, and ſhould make it a rule to decide *ſecundum equum & bonum.*

That in caſes of elections for boroughs in Scotland, where a ſituation ariſes not foreſeen, or, at leaſt, not provided for, by the legiſlature, the parties may proceed according to their diſcretion, in the manner moſt conſiſtent with reaſon and juſtice, is proved by a remarkable caſe which happened a few years ago. Jedburgh, at a time whan it chanced to be the preſiding borough of its diſtrict, was, in conſequence of a ſentence of reduction by the court of ſeſſion, under a diſability of chooſing magiſtrates: of courſe, it could have no delegate at the election of the member to repreſent the diſtrict in Parliament. It came, therefore, to be a queſtion, which of the remaining boroughs ſhould have the preſidency. Haddington had preſided laſt; Dunbar was next in rotation after Jedburgh: the order of the five being Haddington, Jedburgh, Dunbar, North Berwick, Lauder. This caſe was not provided for by the ſtatute of the 16th of the late King (1). Mr. Warrender had the votes of Dunbar and North Berwick, Mr. Ogilvy, (one of the members of the preſent Committee) thoſe of Haddington and the other remaining borough of the diſtrict. There being an equality of voices, which ever of the two contending boroughs had a right to the preſidency, and the caſting vote, muſt turn the election. The delegate for Dunbar claiming that right, (and inſiſting that the diſtrict was to be conſidered as conſiſting only of four boroughs in the following rotation, Dunbar, Lauder, North Berwick, Haddington, Dunbar, Lauder, &c.) voted a ſecond time for Warrender, and he was returned. The other candidate, for whom the delegate for Haddington had given a ſecond vote, petitioned; contending that the caſe was within the 28th ſection of the ſtatute abovementioned, and that the caſting vote ought to revert to the laſt preſiding borough. But the petition coming to be referred to a Committee (the ſecond that ſat after the new judicature was eſtabliſhed), that Committee determined, 19 April, 1771, That Warrender was duly elected (2) (F).

In

(1) Cap. xi. ſect. 28.
(2) Journ. vol. xxxiii. p. 265. col. 2.

In the preſent caſe, there was (at firſt) an election in ſtrict conformity to the ſtatute;—the ſtatute was therefore obeyed; but afterwards, an event having happened not provided for, the corporation exerciſed their diſcretion, and all thoſe who, on the former occaſion, had voted unanimouſly for Ferguſon, having alſo been unanimous in electing Newall, he was, to all intents and purpoſes, the delegate of the ſame perſons; his act was as much theirs as Ferguſon's would have been, and, as they do not, no one elſe has a right to complain.

If the appointment and vote of Newall ſhould ſtill be thought to have been illegal, yet, as the law was ſo uncertain, that Mr. Ferguſon, an advocate of character, and many other gentlemen of great reputation at the Scotch bar, thought that the reſignation of the one, and the ſubſequent election of the other were valid, the utmoſt effect of the illegality of the choice of Newall could only be a void election.

IId Point.] But even that cannot be the caſe, if, by the known and eſtabliſhed law, Mr. Daſhwood was not eligible; for then the ſuffrages given in his favour muſt be conſidered as thrown away, and, ſuppoſing Newall incapable of voting, ſtill, the only remaining delegate having alſo voted for Norton, he muſt be determined to be duly elected.

Now, it is well known to every lawyer in Scotland, that, to be capable of repreſenting a diſtrict of boroughs, the candidate muſt be a burgeſs of ſome of thoſe boroughs (G). The writ particularly commands the ſheriff to cauſe to be elected commiſſioners for the election of a *burgeſs* (1) for each diſtrict; and the ſheriff, in his precept (2), following the words of the writ, commands the magiſtrates, and town-council of each borough, to elect a commiſſioner, in order to elect a *burgeſs* for the diſtrict to which it belongs.

By certain acts of the convention of boroughs referred to by Sir George Mackenzie, and by an unprinted ſtatute of the third Parliament of Charles the Second cited likewiſe by that author, it was ordained, that only actual trading merchants ſhould repreſent the boroughs in Scotland, and,

(1) Wight's Law of Elections for Scotland, Appendix, p. 383. (2) Ibid.

though that act is not perhaps in force, yet it shews the sense of the legislature at that time, and confirms the established rule, that the representatives of boroughs must at least be burgesses of some of those boroughs.

Not only the writ and precept, but all the statutes on the subject since the union, denominate the members for boroughs *burgesses* (1).

Some qualification or other is necessary for all members of Parliament. In order to represent a county in England, a man must be possessed of six hundred pounds a year in land, and of three hundred in order to represent a borough (2). In like manner, to be chosen a commissioner for a shire in Scotland, a man must have such an estate in the county as entities him to be an elector (3). By analogy, therefore, we must conclude that, to be capable of being elected for a district of boroughs, some qualification is requisite, and that qualification is the being a burgess in one of the boroughs of the district.

COUNSEL for the petitioner, in reply.

Ist Point.] The statute of the 7th of George the Second is clear, explicit, and certainly cannot be dispensed with. If it be true, that a Committee for trying controverted elections is to be considered as a court of equity, as well as of law, yet, a power of dispensing with acts of Parliament does not come within the proper *English* sense of equity. This power the Chancellor has as little pretensions to as the courts of King's Bench and Common Pleas. Indeed, even according to the popular notion of equity, the Committee could not be justified in depriving the petitioner of a right which has fairly accrued to him by a positive act of the legislature. It has already been said, that the chief view of the Parliament, in laying down rules for the election of delegates, appears evidently to have been, to give all persons concerned sufficient time to think of a proper person, and to attend at the election. *That* is the meaning of leaving two free days between the day of appointing, and the day appointed for, the election. If a case has arisen

(1) 16 Geo. II. cap. 11, &c.
(2) 9 Ann, cap. 5. § 1.
(3) Wight, p. 267, *vide infra*, Case of Clackmannanshire.

ariſen where that was impoſſible, we muſt interpret the law as if it had ſaid, "Better *that* particular borough ſhould "want a delegate, than have one choſen without this pre-"vious warning to thoſe concerned." It is no anſwer to ſay, "*In this caſe there was no ſurprize. All thoſe preſent at "Ferguſon's election, were alſo preſent at that of Newall, and "were, in both inſtances, unanimous.*" Be it ſo; ſtill the precedent is dangerous, and againſt law.

When the law has aſſigned a particular day for any election, it is neceſſary, in almoſt all caſes, that ſuch election ſhould be made on that particular day; otherwiſe it is void.

In Engliſh boroughs, till not many years ago, if the corporation ſlipped the charter-day for the choice of their annual magiſtrates, they never afterwards could be elected; and, although the immediate conſequence was, (or at leaſt the neceſſary ſubſequent conſequence muſt be), a diſſolution of the corporation, yet the law ſuffered that conſequence, rather than permit the election to be made on another day. This part of the law was big with monſtrous inconvenience, infinitely greater than what is ſuggeſted in the preſent caſe; yet no court, either of law or equity, ever thought that they could diſpenſe with it, on any occaſion the faireſt or moſt favourable; and it continued, till the legiſlature interpoſed, and altered it in the 11th year of George the Firſt (1).

The caſe of Jedburgh bears no reſemblance to the preſent. There one of the boroughs was *(pro tempore)* extinct, and the diſtrict was, as the ſitting member alledged, reduced to the number of four. It was therefore, perhaps, agreeable to the ſtatutes that it ſhould proceed as if it had always been a diſtrict compoſed of that number. However, the principles, on which that caſe was decided, were ſo far from being underſtood to be clear, that the Lord Advocate of Scotland thought an act of Parliament neceſſary to provide for ſimilar caſes which might afterwards occur; and, accordingly, by a ſtatute of the 14th of the preſent King, it was enacted, That, in ſuch caſes, the right of preſidency ſhould go on to the borough next in rotation (2), agreeable to the deciſion of the Committee in 1771. If there had

(1) 11 Geo. I. cap. 4. *vide ſupra*, Caſe of Helleſton, p. 20.
(2) Cap. 81. § 2.

been no doubt concerning the law of that deciſion, ſuch a ſtatute would not have been requiſite (H).

IId Point.] All the arguments which have been brought to ſhow, that a member for a diſtrict of boroughs in Scotland muſt be a burgeſs of one of thoſe boroughs, prove too much. The unprinted ſtatute of Charles the Second, and the laws of the convention of boroughs, referred to by Sir George Mackenzie, require the member to be an actual trading merchant, and, if the word "*burgeſs*, in the writ, and in the precept, means a corporator, it muſt mean one who is effectually ſo, and not a mere *honorary* burgeſs, who is in truth no member of the corporation, nor, in any legal reſpect, a burgeſs. It is well known that ſuch honorary burgeſſes, in Scotland, have no corporate rights, and can join in no corporate act. They cannot be choſen into the magiſtracy of the borough; nor can they vote at a poll-election, at which all the real burgeſſes are entitled to vote (I). In ſhort, the creation of them is a vain compliment, (of which the boroughs are known to be very liberal to all claſſes of people,) and to all intents and purpoſes a mere nullity.

Now it is a fact, which will not be denied, that, at leaſt ever ſince the union, there is ſcarce an inſtance of a member for Scotch boroughs being any thing more than an honorary burgeſs. Will it be ſeriouſly maintained, that all the repreſentatives of thoſe boroughs, in the Britiſh Parliament, have been illegally choſen, and that they had no right to their ſeats?

In England, by the poſitive ſtatute law, it was ordained, That the citizens and burgeſſes of the cities and boroughs, ſhould be "choſen men, *citizens, and burgeſſes, reſiant, dwelling, and free*, in the ſame cities and boroughs, and no other, in any wiſe (1)." Yet the gradual operation of time (K), had ſo far repealed that ſtatute, that, for centuries, it was never adhered to, and before the ſtatute of laſt year (2), which directly repealed it, the non compliance with it would never have been allowed as an objection to the member for an Engliſh city or borough.

In Scotland, no poſitive exiſting law has been ſhown, requiring the qualification contended for by the counſel for the

(1) 1 Hen. V. c. 1.
(2) 14 Geo. III. c. 58.

the ſitting member; and, if there were ſuch a law in the Scotch ſtatute-book, it is there ſubject to the operation of what, in the legal language of that country, is called *Deſuetude*, and, by not being enforced for ſo long a courſe of years, has repealed itſelf.

It is ſaid, That the writ and precept command that *burgeſſes* ſhall be elected. So does the Engliſh writ. Indeed, the meaning of the words "*burgeſs*" and "*citizen*," applied to members of parliament, ſeems to be quite different from their ſignification, when uſed for members of corporate bodies. In the firſt caſe, they are only employed in contradiſtinction to "*knights of the ſhire*," and they no more mean corporators, than the word "*knights*' in that part of the writ which reſpects county elections, means perſons of any particular order of knighthood.

This is clearly demonſtrated by the caſe of the members for the two Univerſities. In the ſheriff's writ, in the precept, and in the return *they* are denominated *burgeſſes* of the Univerſity, although, as *corporate* members of the Univerſity, no ſuch perſons as burgeſſes can exiſt (L).

It is ſaid, that, as certain qualifications are required by law in all other members of the Houſe of Commons, we cannot ſuppoſe that no qualification is requiſite in order to repreſent a diſtrict of Scotch boroughs. But, in the firſt place, all the qualifications which have been ſtated by the counſel on the other ſide are created by ſtatute, and were unknown to the common law, and, in the ſecond place, the fact alledged is not true, for no qualification whatever is neceſſary in the repreſentatives of the two Engliſh Univerſities.

If a qualification, at all like what is contended for, was neceſſary by the ancient law of Scotland, it muſt have been, that the repreſentative of each borough ſhould be a burgeſs of that individual borough. This, from the nature of the repreſentation ſince the union, cannot now be neceſſary. If it were, as the member for a diſtrict repreſents every borough in that diſtrict, no man could be choſen for ſuch diſtrict, without being a burgeſs of every one of the four or five boroughs, of which it is compoſed. What would be the conſequence? Any one of the boroughs, by refuſing to beſtow the freedom of their town on a candidate, might

put

put a negative on the election of a perſon in whoſe favour all the others would have united; by which means the right of the majority to chooſe their repreſentative would be, in effect, overturned.

The Scotch act of 1707, provides, That none ſhall be capable of being elected (1), but ſuch as were capable of being ſo before the union; but that proviſion muſt be ſo conſtrued as to be conſiſtent with the new mode of repreſentation, which the qualification contended for, if taken in its full extent, is not. In this very caſe, the ſitting member has but a fourth of that qualification.

That the act of 1707 is to be ſo conſtrued, is proved by the caſe of Edinburgh, 13 March 1711, which, as to the principle, is exactly in point to the preſent argument. The caſe was ſhortly this.

On the petition of Henry Hamilton, Eſquire, complaining of an undue election, and return of Sir Patrick Johnſton, for the city of Edinburgh, "being incapable of ſitting "in *this* Parliament, in regard he is a *merchant*, and ſerved "for the ſaid city in the laſt Parliament," it was ſhown, by the petitioner's counſel, that by a decreet arbitral, confirmed by King James the Sixth of Scotland, as umpire (*anno* 1583), and ratified in Parliament, the two members to ſerve in Parliament for that city, were always to be, one a merchant, and the other a craftſman; and that ſuch was the conſtitution of Edinburgh, which had always been followed till the union. From this they inferred, that, in reſpect the merchants and tradeſmen of the ſaid city were, before the union, diſtinctly repreſented, they ought ſtill to be ſo, by electing a merchant and a tradeſman by turns. The counſel for the ſitting member admitted, that the conſtitution of Edinburgh, before the union, had been as alledged, but inſiſted, "That, by the act of union, the con"ſtitutions of the royal boroughs, as to their elections to "Parliament are altered; *and other burghs are to elect a "commiſſioner in the manner then in uſe; and they are to elect "by turns* (M): but Edinburgh is excepted; and the elec"tion there, which is to be but of one member only, is "left free, and the voters at liberty to chooſe whom they "pleaſe." Upon the whole matter, the Committee and the

(1) Ruffhead's Statutes, vol. iv. p. 233.

the whole Houſe reſolved, " That the ſitting member was " duly elected (1)."

On Thurſday the 23d of March, the Committee, by their chairman, informed the Houſe, that they had determined;

That Henry Watkin Daſhwood, Eſquire, the petitioner, was duly elected, and ought to have been returned (2).

(1) Journ, vol. xvii. p. 136. col. 2.
(2) Votes, p. 417, 418.

NOTES

NOTES

ON THE CASE OF

WIGTOWN, &c.

PAGE 88. (A.) When gentlemen of the Scotch and Engliſh bar appear as counſel in the ſame cauſe, and on the ſame ſide, the rule is, that their precedence is determined by their ſtanding at their reſpective bars. By this rule, Mr. Lee, who, (as a barriſter) is Mr. Croſby's ſenior, ought to have been the leading counſel in this cauſe; but, by Mr. Lee's deſire, Mr. Croſby opened the cauſe for their client.

P. 91. (B). The order of the diſtricts of the royal boroughs of Scotland, and of the different boroughs in each diſtrict, which, by the Scotch ſtatute of 1707, was ſettled according to *that* in which they uſed to be called in the rolls of the Parliament of Scotland, is as follows.

(☞ It is obſervable, that in the ſtatute itſelf they are not enumerated in their proper order, but according to their local ſituation, the moſt northerly being placed firſt.)

Edinburgh		Edinburgh.
Diſtrict		
1. Tain,	Within the juriſdiction of the ſheriff or ſteward of	Roſs.
Dingwall,		Roſs.
Dornoch,		Caithneſs.
Wick,		Caithneſs.
Kirkwall,		Orkney and Zetland.
2. Inverneſs,		Inverneſs.
Nairn,		Nairn.
Forres,		Elgin.
Fortroſe,		Elgin.
3. Elgin,		Elgin.
Banff,		Banff.
Cullen,		Banff.
Kintore,		Aberdeen.
Inverury,		Aberdeen.

4. Aberdeen,

District.		
4. Aberdeen,	Within the jurisdiction of the sheriff or steward of	Aberdeen.
Montrose,		Forfar.
Brechin,		Forfar.
Aberbrothick,		Forfar.
Inverbervie,		Kincardine.
5. Perth,		Perth.
Dundee,		Forfar.
St. Andrew's,		Fife.
Coupar,		Fife.
Forfar,		Forfar.
6. Anstruther Easter,		Fife.
Pittenweem,		Fife.
Crail,		Fife.
Anstruther Wester,		Fife.
Kilrenny,		Fife.
7. Dysart,		Fife.
Kirkcaldie,		Fife.
Bruntisland,		Fife.
Kinghorn,		Fife.
8. Stirling,		Stirling.
Inverkeithing,		Fife.
Dumfermline,		Fife.
Culross,		Perth.
Queensferry,		Linlithgow.
9. Glasgow,		Lanerk.
Dunbarton,		Dunbarton.
Renfrew,		Renfrew.
Ruthergien,		Lanerk.
10. Haddington,		Haddington.
Jedburgh,		Roxburgh.
Dunbar,		Haddington.
North Berwick,		Haddington.
Lauder,		Berwick.
11. Linlithgow,		Linlithgow.
Selkirk,		Selkirk.
Lanerk,		Lanerk.
Peebles,		Peebles.
12. Dumfries,		Dumfries.
Kircudbright,		Kircudbright.
Annan,		Dumfries.
Lockmaben,		Dumfries.
Sanquhar,		Kircudbright.
13. Wigtown,		Wigtown.
Whitehorn,		Wigtown.
New Galloway,		Kircudbright.
Stranraer,		Wigtown.

14. Ayr,

District.			
14. Ayr,	-	Within the jurisdiction of the sheriff or steward of	Ayr.
Irvine,	-		Ayr.
Rothsay,	-		Bute.
Inverary,	-		Argyle.
Campbeltown,			Argyle.

See Wight, p. 376.

P. 91. (C). Although the delegates for boroughs in Scotland, are not in the nature of proxies, or attorneys, but are rather to be considered as the men whom their respective boroughs judge best qualified to choose a member fit to represent the district, and, in such choice, are entirely independent of their constituents, yet it is said, that the first instance since the union, of a delegate voting contrary to the sense and wishes of his borough, happened at the last general election.

P. 95. (D). See the Case of New Radnor, Note (D). *supra*, vol. i. p. 95. where it will be found that Sir Edward Coke made this distinction between *directory* statutes, and those which are *mandatory*, or (as he perhaps more properly, termed them) *concluſory*.

Page 95. (E) In 1770, on a petition of Hugh Owen, Esq. complaining of the undue election of Sir Richard Philips, for the county of Pembroke, one of the grounds on which the counsel for the petitioner went, was, that the election had been holden at Pembroke instead of Haverfordwest. It appeared, that from 1625 to 1696, no election for the county had been holden at the town of Pembroke. That from 1696 to 1727, only two had been holden there; and that from 1727 to the election in question, they had been always holden at Haverfordwest, except once in 1741. The House determined, 27 April, that Mr. Owen the petitioner was duly elected. In 1741, the election was contested, and lasted several days. It must be to that election (of 1741) that the counsel alluded in this case of Wigtown.

P. 96. (F). The entries in the Journals respecting this case, are as follows.

" 19 March, 1771, a Petition of Charles Ogilvie, was pre-
" sented and read, setting forth, That at the last election of a
" member to serve in Parliament for the boroughs of Jedburgh,
" Dunbar, North Berwick, Lauder, and Haddington, one
" of the districts of boroughs entitled to send members to Par-
" liament, the petitioner, and lieutenant colonel Patrick War-
" render, stood candidates, and that, by the rotation establish-
" ed by law, Jedburgh was the presiding borough, and its com-
" missioner,

" miſſioner, or delegate, the præſes of the meeting, and, in " abſence of the delegate from Jedburgh, the delegate from " Haddington had the right of preſiding, and that the bo- " rough of Jedburgh had no delegate at the ſaid election, and " the delegate from Haddington accordingly preſided, and " gave his caſting vote in favour of the petitioner, the number " of voices being before equal; but the ſheriff of the county " of Haddington, within which county the boroughs of Dun- " bar, North Berwick, and Haddington lie, having iſſued his " precepts to thoſe boroughs commanding their delegates to go " to Dunbar, as the preſiding borough, and place of election, " a return was thereby procured in favour of the ſaid Patrick " Warrender, in wrong of the petitioner, who was then, and " there, duly elected, and ought to have been returned the " burgeſs accordingly, and that the return of the ſaid Patrick " Warrender is injurious to the petitioner, and in manifeſt vio- " lation of the laws requiring fair and juſt elections; and there- " fore praying," &c. Vol. xxxiii. p. 265. col. 2.

" 19 April, 1771, Mr. Montagu informed the Houſe, that " the ſelect Committee, to whom the petition of Charles Ogil- " vie, Eſq. complaining of an undue election and return for " the boroughs of Jedburgh, Dunbar, North Berwick, Lau- " der, and Haddington, was referred, have tried the merits " of the ſaid petition, and have determined,

" That Patrick Warrender, Eſq. is duly elected a commiſ- " ſioner to ſerve in this preſent Parliament for the ſaid diſtrict " of boroughs." Same vol. p. 338. col. 2. See alſo Wight, from p. 363, to page 368.

P. 97. (G) Mr. Wight, in his late publication on the law concerning Scotch elections, lays this down as a qualification abſolutely neceſſary. " No other qualification (ſays he) is ne- " ceſſary to entitle one, who is not diſabled by certain ſtatutes " (which he refers to) to repreſent a diſtrict of boroughs, but " *that he be admitted a burgeſs of one or other of the boroughs of* " *which that diſtrict is compoſed.*" p. 373. But he cites no authority whatever in ſupport of that poſition, and I do not find that there is any authority for it in the ſtatute book of Scotland.

P. 100. (H). The 14th of George III. cap. 81. is clearly in the ſtyle of an *enacting* not a *declaratory* ſtatute. Although in Weſtminſter-hall, the general rule is, that where a point has been directly determined by the court of ultimate juriſdiction, their determination is to be conſidered as the law on that point, yet that rule is not univerſal. In the famous caſe of *Reeve* againſt *Long*, in the reign of King William, the court of Com- mon Pleas, and, on a writ of error, the court of King's Bench held, that the ſon of a tenant for life, who was next in remain- der after the father, and who was a poſthumous child, and therefore born after the particular eſtate determined, could not take

take the eſtate, but that it muſt go over to the next in remainder. The Houſe of Lords reverſed the concurrent judgments of both the inferior courts, but againſt the opinion of all the judges. A few years afterwards, the ſtatute of the 10th and 11th William the Third, cap. 16. *enacted*, that, in caſes of ſuch limitations by any marriage, *or other ſettlement*, the poſthumous child ſhall take. By this *enacting* ſtatute, the legiſlature indirectly ſaid, that the judgment of the Houſe of Lords in Reeve and Long was not law. *Nota.* Though, from the hiſtory of the caſe, and ſtatute, there is little reaſon to doubt, but that, by the general expreſſion "*other ſettlement*," were meant *wills* as well as *deeds*, (for the queſtion in Reeve and Long aroſe upon a will), yet it is extraordinary that, in an act of Parliament which was made in order to prevent the inconvenience ariſing from a nice legal ſubtlety, the legiſlature ſhould have uſed words ſo inaccurate as to leave a poſſibility of queſtioning whether they really extended to the evil meant to be remedied. Vide 1 Salk. p. 228.

P. 100. (I). For the form of a warrant for a poll-election, ſee the Appendix to Wight, p. 389. *Honorary* burgeſſes are expreſsly excluded from voting by that warrant. Formerly it would ſeem that the election of magiſtrates in the royal boroughs in Scotland was popular. The ſtatute of 1469, cap. 29. reciting, "That there was great contention zeirly for the chuſing "of the ſamin, throw multitude and clamour of commounes, "ſimple perſones," enacted, that the old council ſhould chooſe the new. However, when a borough is *reduced*, the King ſtill exerciſes the prerogative of iſſuing a warrant for reviving it by a popular election, called a poll-election. I have not been able to find on what law this power in the Crown is founded. Mr. Wight, where he is expreſsly treating of poll warrants, does not mention it, (Wight, p. 344.), nor Macdowal, (vol. ii. p. 581). When, by reaſon of diſturbances in the country, or ſome other cauſe, the legal day for the election has been ſlipped, ſo that there can be no magiſtrates and council choſen in the uſual manner, the King ſometimes directs by his warrant, that only the magiſtrates, or the magiſtrates and council of the former year, ſhall make the election. (Wight, *ibid.*)

P. 100. (K.) According to the rules of the Engliſh law, no ſtatute can be abrogated by diſuſe, and the only conſtitutional method of reconciling the fact as to this and ſome other old ſtatutes with the law, is to adopt the diſtinction of Sir Edward Coke, between ſtatutes *directory* and *concluſory*. *Vide ſupra*, p. 106. note (D).

P. 101. (L). For the writ to the ſheriff of Oxford, *Vide ſupra*. Caſe of Abingdon, Note (A). The words of the return

turn to the precept directed to the Univerſity of Oxford, are, "—— Witneſſeth, that the aforeſaid Chancellor, Maſters, and "Scholars, of the aforeſaid Univerſity, freely and indifferently "have choſen two of the moſt diſcreet and ſufficient men of "the aforeſaid univerſity *to be their burgeſſes of the Parliament* "of the ſaid Lord the King," &c.

P. 102. (M). Theſe are the words of the Journals. They mean that the election was to be holden at each of the different boroughs in a diſtrict by turns.

XVIII. THE

XVIII.

THE

CASE

Of the BOROUGH and COUNTY of the

TOWN of POOLE.

The Committee was choſen on Friday, the 24th of March, and conſiſted of the following Gentlemen.

Lord Charles Spencer, Chairman.		Oxfordſhire.
John Elwes, Eſq.	Members for	Berkſhire.
Charles Turner, Eſq.		York.
John Tempeſt, Eſq.		Durham
Thomas Knight, Eſq.		Kent.
George Grenville, Eſq.		Buckinghamſh.
Sir William Guiſe, Bart.		Glouceſterſhire.
Charles Wolſeley, Eſq.		Milborne Port.
Sir John Eden, Bart.		Durh. county
Sir Adam Ferguſon, Bart.		Ayrſhire.
Hon. Lucius Ferdinand Cary,		Bridport.
Thomas Powys, Eſq.		Northamptonſh.
Thomas Edwards Freeman, Bart.		Steyning.
NOMINEES.		
Of the Petitioners,		
William Adam, Eſq.		Gatton.
Of the Sitting Members,		
Viſcount Liſborne,		Cardiganſhire.

PETITIONERS.

Hon. Charles James Fox, and John Williams, Eſq.

Several Inhabitants and Houſeholders, (and alſo paying ſcot and bearing lot,) within the Borough and County of the Town of Poole.

Sitting Members.

Sir Eyre Coote, K. B. Joſhua Mauger, Eſq.

COUNSEL

For the Petitioners,

Mr. Alleyne, Mr. Elliot.

For the Sitting Members,

Mr. Wilſon, Mr. Batt.

THE CASE

Of the BOROUGH and COUNTY of the TOWN of POOLE.

ON Saturday, the 25th of March, the Committee being met, the two petitions were read, by which it appeared, that the only queſtion in the cauſe was,

Whether the right of the election is "In the burgeſſes of the borough excluſively;" or

"In the inhabitants and houſeholders within the borough, "paying ſcot and bearing lot (1)."

The ſheriff had rejected thoſe who tendered their votes as inhabitants, houſe-holders, and only admitted the votes of burgeſſes (2).

It was admitted, by the counſel on both ſides, that a great majority of the latter were in favour of the ſitting members; and

That, if the former have a right to vote, there was a great majority for Mr. Fox and Mr. Williams.

After the petitions had been read, the Chairman, according to the uſual form, directed the clerk to read the laſt determination in the Houſe of the right of election.

The counſel for the petitioners denied that there is in the Journals any reſolution of the Houſe, touching the right

(1) In the petitions the words "paying ſcot and bearing lot" were inſerted, but in parentheſis. Mr. Fox and Mr. Williams had polled a ſufficient number to give them a majority, whether the payment of ſcot and lot ſhould be thought an eſſential qualification to perſons voting as inhabitants, houſeholders, or not.

(2) Votes 6 Dec. p. 33, 34.

right of election in this borough, which can be conſidered as a determination, within the meaning of the ſtatute.

The counſel for the ſitting members inſiſted, that ſuch a determination is to be found in the entry in the Journals of the proceedings with regard to this borough, of the 9th of February 1688-9.

This preliminary queſtion was argued by all the counſel.

The entry referred to is as follows.

A petition of Thomas Chaffin, Eſquire, complaining that Sir Nathaniel Napper had been returned, in prejudice to the petitioner, having been referred to the Committee of privileges and elections, their chairman reported to the Houſe,

"That the matter in queſtion was, Whether the right "of election be in the mayor and burgeſſes only; or in the "mayor, burgeſſes, and commonalty, who pay ſcot and "lot:

"That it appeared to the Committee, by many parliament returns, which were produced to the Committee, "that the right of election had anciently been in the mayor "and burgeſſes only; except a return in the 18th year of "King James the Firſt; wherein the *commonalty* are mentioned, with the mayor, aldermen, and burgeſſes, in the "indenture; but that indenture is ſealed with the *common "ſeal* of the mayor, aldermen, and burgeſſes.

"That Sir Nath. Napper had thirty-three burgeſſes, and "Mr. Chaffin but twenty-two.

"But, of the *commonalty*, that Mr. Chaffin was allowed "to have had the greater number.

"And that, thereupon, the Committee had agreed on "two reſolves.

1. "That it is the opinion of the Committee, that the "right of election of burgeſſes to ſerve in this preſent convention, for the town and county of Poole, is in the "mayor, burgeſſes, and commonalty, of the ſaid town and "county, who pay ſcot and lot.

2. "That it is the opinion of this Committee, that Thomas Chaffin, Eſquire, is duly elected a burgeſs to ſerve "in this preſent convention, for the town and county of "Poole.

"A debate ariſing in the Houſe thereupon;

"The queſtion being put, That this Houſe do agree "with the Committee, that the right of election of bur-

"geſſes

" geſſes to ſerve in this preſent Convention, for the town " and county of Poole, is in the mayor, burgeſſes, and " commonalty of the ſaid town and county, who pay ſcot " and lot;

" It paſſed in the *negative*.

" The queſtion being put, that the Houſe do agree with " the Committee, That Thomas Chaffin, Eſquire is duly " elected to ſerve in this preſent Convention, for the town " and county of Poole;

" It paſſed in the *negative*.

" Reſolved, That Sir Nath. Napper, Baronet, is duly " elected a burgeſs to ſerve in this preſent Convention, for " the town and county of Poole (1)."

COUNSEL for the petitioners.

This diſagreement of the Houſe from the Committee can never be conſidered as a determination within the meaning of the ſtatute of George the Second, becauſe, the conſequence of ſuch a determination being to ſhut the door againſt all future enquiry, and to conclude all perſons concerned, with regard to one of the moſt valuable rights known in the conſtitution of this country, it ought to be *poſitive* and *explicit*.

All that can be inferred from the diſagreement of the Houſe is, that they did not think that the concluſion drawn by the Committee was warranted by the evidence which they appeared, by their report, to have had before them, and, therefore, did not adopt that concluſion.

If the Houſe had meant to declare the right of election in Poole, upon that occaſion, they would have done it, as in other ſimilar caſes, by a *direct* reſolution.

Where the Houſe puts a negative on any propoſition, it would be ſtrange indeed, if we muſt infer that by ſuch negative the converſe of that propoſition is neceſſarily eſtabliſhed.

There is no other inſtance where a diſagreement of the Houſe, from a reſolution of the Committee of privileges and elections, has been conſidered as a laſt determination.

It was argued, on the other ſide;

(1) Journ. vol. x. p. 24. col. 2.

That this was certainly a determination or judgment of the Houſe, upon the right of election; for that Sir Nathaniel Napper could not have been adjudged to be duly elected, but upon the foundation of the right being in the mayor and burgeſſes, excluſive of the other claimants.

That it is not neceſſary that the determination, in order to bring it within the meaning of the ſtatute, ſhould be in the technical form of a *reſolution*. If that had been the intention of the legiſlature, the word "*reſolution*," would have been uſed in the ſtatute (1).

The counſel being directed to withdraw, the Committee deliberated for about two hours, when they were called in again, and informed, by the Chairman, that the Committee had

Reſolved, That they ſhould proceed to give evidence of the right of election.

The counſel for the petitioners endeavoured to prove the right to be as ſtated in the petitions, from general principles of law, and from the hiſtory, conſtitution, and ancient uſage of the borough.

The ſubſtance of their arguments and evidence was as follows.

The general rule of law is, that in boroughs where there is no original charter, and no *preſcriptive* uſage limiting the right of election, it is in the inhabitants houſe-holders. This rule is recognized in a variety of caſes in Glanville's book, particularly in thoſe of Cirenceſter, p. 107, and Pontefract, p. 142, and in Whitelock's Commentary, vol. i. p. 500 (2). In the caſe of Cirenceſter (or Ciceſter), the entry in the Journals is in theſe words, "Reſolved, "That where no cuſtom, nor charter for election, "there the inhabitants, houſeholders, ought to make the "election (3)."

That the ancient proper ſenſe of the word, "*burgenſes*," or "*burgeſſes*," is "*the inhabitants of a borough*," is proved by the following authorities. Spelman's Gloſſary, Title "*Burgenſes*." Whitelock's Commentary, vol. i. p. 500. vol. ii. p. 95. (4). Madox's Firma Burgi, p. 2. No. 111; and that Houſe has ſo underſtood the word both in ancient charters,

(1) *Vide Supra*, Caſe of Pontefract, vol. i.
(2) *Supra*, Caſe of Pontefract, vol. i.
(3) Journ. vol. i. p. 792. col. 1.
(4) *Vide* Caſe of Pontefract, vol. 1.

charters, and in returns, appears from the case of Abingdon, 23 May, 1660 (1), and that of Aldborough in Yorkshire, 17 May 1690 (2).

From an inspection of all the ancient charters, granted to the corporation of Poole, it will be evident, that, down to one of the 10th year of the reign of queen Elizabeth, "*burgenses*," in those charters means "*inhabitants*."

It will also appear, from inspecting the ancient returns to Parliament from this borough, until that period, that they all run in the name of the mayor and *burgenses*.

And the necessary conclusion must be, that the returns of members of Parliament, and the elections, were made by the mayor and *inhabitants* down to the 10th of Elizabeth.

☞ All the ancient records cited in this case, were given in evidence, and I transcribed the passages taken from them, from copies and translations, collated, and admitted by the parties.}

EVIDENCE.

'Poole is a borough by prescription.

'The first charter to be found has no date, but is supposed to have been granted some time between 1 and 9 Ric. I. very near the beginning of legal memory, about the year 1190. By this charter, William Longespee, (or Longsword,) lord of the manor of Great Canford and Poole, grants and confirms to his *burgesses* of Poole and their heirs *(inter alia,)* That his said burgesses should have well and peaceably their yearly *liberty of herbage* in his heath, as they had always been accustomed to enjoy, and necessaries *for their firing* in his heath or common, by the view of his bailiffs. By the same charter, a particular form of government was chalked out for the borough. The said burgesses, out of their own number, were to choose *six burgesses*; out of which six, he, (the lord), was to appoint one to be head ruler, (*propositus*), and who was to be amoveable at his, or their pleasures, if he should neglect his duty. The charter states, that, for the above grant and confirmation, the said burgesses had given threescore and ten marks, or about 56l. sterl.'

(1) Journ. vol. viii. p. 42, col. 1, 2.

(2) Journ. vol. x. p. 418, col. 1, 2. See those two cases cited in the case of Pontefract, *supra*, vol. 1.

COUNSEL for the Petitioners.

From this charter it appears, that the word "*burgeſſes*" is applied to the body at large, as an exiſting body before the grant: they were therefore *preſcriptive burgeſſes*, i. e. *the inhabitants*. The ſix burgeſſes were to be choſen, as it would ſeem, merely as ſix perſons out of whom the lord might name one to be a *propoſitus*, and did not form a ſelect body for any other purpoſe.

Under this grant, confirmed by all the ſubſequent charters, the *inhabitants* of Poole have always enjoyed, and to this day continue to enjoy, a right of common.

EVIDENCE.

'To prove the right of common in the inhabitants John 'Hadden, Eſq. was called.

'It appeared that he is poſſeſſed of an eſtate for 99 years 'in the manor of Canford, and that he is an *inhabitant* of 'Poole; the tenants of the manor of Canford have an *un-* '*limited* right of common.

'His evidence was objected to by the counſel for the 'ſitting members.

'It was ſaid, that he was an intereſted witneſs; That, if 'he could eſtabliſh the right of common in the inhabitants 'of Poole, he himſelf would have a double and more va- 'luable right; for that, although the right of the tenants 'of the manor of Canford, might be *unlimited*, yet that 'does not entitle them to put on any indefinite number of 'cattle; for that, even when you have what is frequently 'called common *ſans nombre*, you can only put on as many cattle as are ſufficient to ſtock and manure your lands (*Quære*) (1).

'The Committee, after the point had been argued, Re- ſolved, Not to admit the evidence.

'James Edwards was called for he ſame purpoſe. He 'is ſteward to Sir John Webb, lord of the manor of Can- 'ford. The amount of his evidence was this:

'The *inhabitants* of Poole *claim* a right of common, and 'take herbage and turf. He never heard any thing to the 'contrary.

(1) Vide 3 Blackſt. p. 238, 239, 4to.

'contrary. Never heard that their right had been conteſt-
'ed by former lords. Has known the manor fifteen years
'Has been houſe-ſteward to Sir John Webb fifteen years;
'but land-ſteward only one year and three months. The
'lord *only drives* the common. He, (the witneſs) never aſ-
'ſiſted but at one drift. On that occaſion, after the com-
'mon was driven, ſeveral *inhabitants* of Poole came, and
'claimed their cattle. He has ſeen turf cut, and carried
'into Poole. There are ſome tenants of Canford-manor,
'who live in Poole. Not many. He does not know whe-
'ther it was for them that the turf was cut. Nor whether
'thoſe inhabitants of Poole, who came to claim their cat-
'tle, were tenants of Canford-manor. He cannot name
'any of them; and cannot tell whether they were more in
'number than thoſe tenants of the manor who reſide in
'Poole.

The next charter, bearing date 10 June, 45 Edw. III.
'(1371), is granted by William Montacute, Earl of Saliſ-
'bury, and lord of the manor of Canford It contains an
'*inſpeximus*, recital, and confirmation of the charter of
'Longeſpee; and grants that the *propoſitus* ſhould be, from
'thenceforth, called Mayor. The grant to the burgeſſes
'to dig turf, and to cut heath and furze, is renewed in
'more expreſs and explicit terms.

'By the third charter, dated 8 Feb. 12 Henry IV. (1411.)
'Thomas de Montacute, Earl of Saliſbury, lord of the
'manor of Canford, recites and confirms the two preceding
'ones, to the aforeſaid *burgeſſes* and their heirs.

'The fourth is a royal grant of Henry IV. in the eleventh
'year of his reign, (1433) founded, as it would ſeem, on
'an act of Parliament to the ſame effect, (*Rot. Parl. in
'Turr. Lond.* 11 *Hen. VI. n.* 38.) to the mayor and
'*burgeſſes*,, that Poole ſhall be a free Port; and giving to the
'ſaid mayor and *burgeſſes* licence to wall, intrench, and
'fortify the ſaid town and port of Poole, and parts adja-
'cent; the ſaid mayor and *burgeſſes* having made an offer
'to that effect.'

COUNSEL for the petitioners.

It cannot be ſuppoſed, that, in this laſt mentioned char-
ter, the word "*burgenſes*" is confined to the ſix particula-
rized in that of Longeſpee, or that the mayor and ſix per-
ſons

ſons only undertook ſo expenſive a work as the propoſed fortification muſt have been.

EVIDENCE.

'By the fifth, dated 1 July, 31 of the ſame King (1454), 'he grants to the mayor, bailiffs, *burgeſſes and inhabitants*, 'a weekly market, and two annual fairs. This too was 'by the authority of Parliament.

'The ſixth, dated 20 Jan. 1 Edw. IV. (1460) contains an '*inſpeximus*, recital, confirmation of the fourth, to the 'mayor and *burgeſſes*, and their ſucceſſors; and proceeds on 'the ſuppoſition of Henry VI. having been only King *de* '*facto*.

'The ſeventh, dated 20 June, 3 Hen. VIII. contains an '*inſpeximus* and recital of the fifth and ſixth, and a confir- 'mation of them to the *mayor and burgeſſes* of the town of 'Poole, and their ſucceſſors.'

COUNSEL for the petitioners.

Here the grant of the market and two fairs to the *mayor, burgeſſes, and inhabitants*, is confirmed to the *mayor and burgeſſes*, which demonſtrates the promiſcuous uſe and meaning of the words "*burgeſſes*" and "*inhabitants*."

EVIDENCE.

'The eighth, dated 12 Hen. VIII. (1521) was not read, 'as being immaterial.

'By the ninth, dated 4 Sept. 18 Hen. VIII. (1527) Ar- 'thur Plantagenet, viſcount Leſley, vice admiral of Eng- 'land, reciting, that the deputy admiral of England, and 'his commiſſary general, had inſpected all the royal grants, 'and privileges, and the former grants of old, and the 'grant of William de Montacute to the *mayor, brethren,* 'bailiffs, *burgeſſes, and inhabitants*, and alſo the late confir- 'mation by Hen. VIII. by which they are fully exempted 'from all kind of juriſdiction and power of the admiral of 'England; declares, that the ſaid privileges are moſt clear- 'ly demonſtrated to belong to the ſaid *mayor, brethren, bai-* 'liffs, *burgeſſes, and inhabitants*; and ratifies and confirms 'the ſame.'

COUNSEL

COUNSEL for the petitioners.

Here, it is evident, that the former grants to the *mayor and burgeſſes*, particularly the grant of the privileges of a free port, were underſtood to veſt thoſe privileges in the *inhabitants*; or, in other words, that the term "*burgeſſes*" included *inhabitants*. And this is declared upon a ſolemn examination of the former grants, by the officers of the lord high admiral, whoſe intereſt it was to deny them thoſe privileges, being an infringement of the general juriſdiction of the admiralty.

EVIDENCE.

The tenth was not read.

(☞ It bears date 18 Feb. 1 Eliz. (1559) 'and contains 'an *inſpeximus*, recital, and confirmation of the former 'charters, granted by the lords of the manor of Canford.)

'The eleventh is in Engliſh, and contains the arms of 'the town of Poole, emblazoned by Clarencieux, king of 'arms, who declares, "Theis be the armes appertaininge 'and belonginge *to the maire, bailyfes, burgeſyes, and inhabi-* 'tants of the town of Poole, and to all the corporacion of 'the ſame, which *inhabitants* of the ſaid towne of Poole, as 'appeared by anncynt charters to me, in my viſitacion 'ſhewed, were *incorporated* by William Longeſpee Erle of 'Sarum by the name of Porte ryve (1), baylyfe, and bur-'geſyes of his town of Poole, parſell of his manor of Can-'ford, which corporacion was ratyfied, amplifyed and con-'firmed by William Monteacute Erle of Sarum, by the 'name of his mayre, baylyfe and burgeſyes of his ſaid 'town and burrough of Poole, which towne and burrough 'of Poole is now in the inheritance of James Blunte 'knyghte, Lord Mountjoye, as in the right of his ſaid 'manor of Canford. The whiche arms above ſet forthe, I 'Clarencieux Kynge of armes have ratified and confirmed 'unto the mayre, baylyfs, burgeſyes, and *inhabitants* of the 'ſaid towne and burrough of Poole in this my preſent viſi-'tacion within the countye of Dorſete."

COUN-

(1) Probably his tranſlation of *Propoſitus*.

COUNSEL for the petitioners.

There is no date to the laſt mentioned inſtrument, but it muſt have been before the 10th year of Queen Elizabeth, becauſe, in that year, Poole was erected into a county (2).

Perhaps it may be ſaid that, notwithſtanding the promiſcuous uſe of the words "*burgeſſes*" and "*inhabitants*" in the foregoing charters, inhabitants are incapable of incorporation, or of taking as a corporate body. But ſuch an opinion is not founded on any ſound principle of law, nor ſupported by any deciſion in Weſtminſter-hall; and there are other inſtances beſides Poole, where inhabitants, as ſuch, are made corporators. In Hobart's reports, p. 14. and in Coke's, part 12. f. 121. it appears that, by the charter of the borough of Dungannon in Ireland, "The inhabitants "of the ſaid borough were made a corporation."

EVIDENCE.

'The returns to Parliament, for the borough of Poole, 'before the 10th of Elizabeth, which are preſerved in the 'Roll's chapel, are as follow.

1. One of 36 Edw. III. The electors are not mentioned in this, it being only the general return of the ſheriff for the whole county (3).

'2. Sept. 12 Edw. IV. "It is witneſſed that *the bur-* 'geſſes of the ſame borough have unanimouſly elected, &c."

'From this return, none can be found till the firſt year 'of Queen Mary.

'3. 23 Sept. 1 Mar. "Between Sir John Rogers, 'knight, ſheriff of the county of Dorſet, of the one partie, 'and John Davy mayor &c. William Grein the byliffe's 'depute, J. M., J. N., M. R., R. R., and T. G. burgeſſes 'of the ſaid towene, Wytneſſethe, that the mayor, byliffe's 'depute, and *burgeſſes* of the ſaid towne have elected," &c. '——Atteſted under *their* common ſeal.

'4 1. Nov. 1 & 2 Phil. & Mar. Between Sir John Tre- 'gonnel knight, ſheriff of the county of Dorſet, of the 'one

(2) Vide infra, Charter of 10 Eliz.

(3) See the Caſe of Abingdon, Note (C) ſupra, vol. i.

'one partie, and William Newman, mayor, Richard God-
'dard, bailieff; J. M., M. R., Th. B., J. C. J. S., *bur-*
'*geſſes* of the ſaid towne of Poole of the other partie, wit-
'neſſethe, that we, the ſaid mayor, bailief, and *burgeſſes* of
'the ſaid town have elected, &c. In witnes whereof, &c
'—the ſaid mayor bailief and *burgeſſes* have put the com-
'mon ſeal of the ſaid town.'

'5. 1 Eliz. "By indenture between Sir John Horſey
'knight, ſheriff of Dorſet, of the one part, and W. G.
'mayor of Poole, W. B., baily, J. M., J. A., (then ſe-
'veral words obliterated) J. D., W. N., J. B., J. C., and
'W. (then ſeveral words obliterated,) ſaid town of Poole,
'witneſſithe that the mayor, bailey and *burgeſſes* of, &c.
'have elected, &c.——In Witnes, &c. the ſaid mayor,
'baily, and (then ſeveral words obliterated) have put to
'their common ſeal, of the ſaid town of Poole.'

COUNSEL for the petitioners.

The above are all the returns which the petitioners have been able to find of a date anterior to the 10th of Queen Elizabeth.

There are no corporation-books of the town of Poole extant, prior to that year.

The reſult of what has been hitherto ſaid, and of the evidence produced, is; That the common law right of election for boroughs is in all the inhabitants houſeholders. That there is no preſcription and no charter prior to the 10th of Queen Elizabeth, contrary to this common law right, in the town of Poole. That "*burgenſes*" (or "*burgeſſes*") is a term uſed in ancient writings and inſtruments for the *inhabitants* of a borough. That it means ſo in the charters of this borough till the 10th of Elizabeth. That all grants to the *burgeſſes* of Poole have, in fact, paſſed the thing granted to the *inhabitants*. That the arms, and, conſequently, the common ſeal, belong to the *inhabitants*, and therefore, that every inſtrument, ſealed with the common ſeal, is the inſtrument and act of the *inhabitants*. That the returns to Parliament, from the earlieſt times, till the 10th of Elizabeth, being ſealed with the common ſeal, and teſtifying that the elections were made by the mayor, bailiff and *burgeſſes*, prove that, till that time, the right of election, which, by the common law, was in the *inhabitants* houſe-

houſeholders, was, in fact, enjoyed and exerciſed by them.

If it could be ſhown, that, from that time to this, the *inhabitants* had never exerciſed, or claimed the right of voting for members of Parliament; if the uniform practice, ever ſince, had been, that elections were made by the mayor, bailiffs, and a certain reſtricted number of inhabitants called *burgeſſes*; if bye-laws, or even royal charters, could be produced, confined the right to them;—no relinquiſhment, no uſage, no bye-law, no charter, nothing but an act of Parliament, or a clear determination of the Houſe (which, coupled with the ſtatute of George the Second, would have the force of an act of Parliament) could have power to deprive them of that right. This is (1) ſupported by the authority of Lord Coke, and fully eſtabliſhed by the caſe of Agmondeſham, Marlow, Wendover, and Hertford, Glanville, p. 87. of Dover, p. 66. of Chippenham, p. 53, and of Winchelſea, p. 17; and in the Journals, by the caſes of Colcheſter (2), 28 March 1628, and Boſton, 8 May, 1628 (3) (A).

But, with regard to Poole, it will appear from the ſubſequent view of the charters, the records of the borough, and the returns of Parliament, with the proceedings on conteſted elections, from the 10th of Queen Elizabeth downwards, that there is not, from that time to this day, any charter which has attempted to narrow the right of election, nor even any bye-law of the borough, no act of Parliament, no determination within the meaning of the ſtatute, (for, if the Committee had thought the entry of 1688-9 was ſuch a determination, they would not have ſuffered the evidence, which has been given, to be produced) and no relinquiſhment, or contrary uſage for more than eighty years.

(☞ The Chairman here interrupted the counſel, to inform them that the Committee did not mean that they ſhould be underſtood to have decided that the proceedings in 1688-9 *do* or *do not* contain a determination of the Houſe within the meaning of the ſtatute.)

EVI-

(1) 4 Inſt. p. 48.
(2) Journ. vol. i. p. 876. col. 2.
(3) Journ. ſame vol. p. 893. col. 2.

EVIDENCE.

'The 12th charter of the borough was granted 10 Eliz. '(23 June, 1568,) and is to the following effect.

'It recites the charter of 3 Hen. VIII. and thoſe therein 'recited, and ratifies and confirms the immunities granted 'by them to the mayor, bailiffs, burgeſſes, and *inhabitants*, 'as the ſaid mayor, bailiffs, burgeſſes, and *inhabitants*, from 'the time of making the ſaid charters, were accuſtomed to 'hold and enjoy them.

'It recites, that the mayor, bailiffs, burgeſſes, and *in-* '*habitants*, time out of mind, had enjoyed the ſaid privileges, '&c. and others, as well by *preſcription* as by reaſon of the 'aforeſaid grants, but that the ſaid mayor, bailiffs, burgeſſ- 'es, and *inhabitants* had not enjoyed them for many years 'paſt, to the great detriment of the ſaid town, by which it 'was threatened with ruin, and the good government of 'the ſame was almoſt extinct.

'That thereupon the *burgeſſes and inhabitants* of Poole 'had petitioned the Queen, that ſhe would make, reſtore, 'and create the ſaid *burgeſſes and inhabitants* into another 'body corporate and politic.

'That ſhe therefore, &c. (hoping that, if the *inhabitants* 'of the town aforeſaid, and their ſucceſſors ſhould enjoy, 'by her grant, greater honours, liberties, and privileges, 'they will think themſelves bound, &c.) grants that the 'ſaid town of Poole ſhall be for ever after a free town of 'itſelf, and be incorporated, to conſiſt of one mayor, two 'bailiffs, burgeſſes and *commonalty*, (in the original *commu-* '*nitas*), and that they the ſaid mayor, bailiffs, burgeſſes, 'and commonalty be one body politic, by the name of the 'mayor, bailiffs, burgeſſes, and commonalty, of the town 'of Poole, &c.

'That the burgeſſes of the town aforeſaid may elect 'every year (on a day fixed by the charter) a fit and diſcreet 'burgeſs to be mayor, and two other burgeſſes of the ſaid 'town to be bailiffs, &c.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonal-* '*ty*, and their ſucceſſors, and the inhabitants and reſidents 'within the ſaid town, be, in no ſort, liable to be bound 'by any precepts of the ſtewards, marſhal, or clerk of the 'houſehold.

'She

'She grants a ſtaple to the ſaid mayor, bailiffs, burgeſſes, 'and *commonalty*, and their heirs, and ſucceſſors; and that 'the ſaid burgeſſes may chooſe, out of themſelves, annual-'ly, a mayor and two conſtables of the ſtaple.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonalty*, 'and their heirs and ſucceſſors, may annually elect and 'conſtitute, (on a day fixed), out of the *inhabitants of the 'town and ſuburbs thereof*, or out of others, all manner of 'brokers, &c.

'She then grants to the ſaid mayor, bailiffs, burgeſſes, 'and *commonalty*, and their ſucceſſors, that the town afore-'ſaid, with the ſuburbs, places, and precincts aforeſaid, 'be, for ever afterwards, one entire *county*, incorporated 'in deed and name, and diſtinct and altogether ſeparate 'from the county of Dorſet, by the name of the county of 'the town of Poole.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonalty* 'ſhall have, in the ſaid town, one ſheriff. The burgeſſes 'of the ſaid town, and their ſucceſſors, in every year, (on 'a day fixed), to elect one diſcreet perſon, out of their 'fellow-burgeſſes, (*comburgenſes* in the original), for the 'ſheriff of the ſaid town.

'She grants to the mayor, bailiffs, burgeſſes, and *com-'monalty* a weekly court, to be held in the Guildhall, be-'fore the mayor and ſenior bailiff.

'To the mayor, bailiffs, burgeſſes, and *commonalty*, that 'the mayor, for the time being, and one ſkilled in the 'law, and alſo four burgeſſes, to be choſen, annually, 'out of the diſcreet burgeſſes, (on a day fixed), ſhall be 'keepers, (i. e. juſtices) of the peace.

'To the mayor, bailiffs, burgeſſes, and *commonalty* view 'of frankpledge, &c.

'To the mayor, bailiffs, burgeſſes, and *commonalty*, and 'their ſucceſſors, that none of them, nor *any inhabitant*, or 'reſident, within the town, &c. ſhall be impanelled, 'againſt his will, on any aſſize, jury, or inquiſition, &c. 'without the town of Poole.

'That the *inhabitants*, *burgeſſes*, *and commonalty*, of the 'town of Poole, may have their guild, and all their liber-'ties, juriſdictions, &c. by land, and by ſea, in the ſame 'manner with the mayor, bailiffs, and burgeſſes of the 'town of Southampton, and all other liberties, &c. which

'the

'the mayor, bailiffs, *burgeſſes and inhabitants* heretofore 'had, or uſed to have.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonalty*, 'and their ſucceſſors, and *all other inhabitants and burgeſſes* 'of Poole, ſhall be free from toll, paſſage, bridgage, 'chimnage, &c.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonalty* 'ſhall have the return of all writs within the town.

'That the ſaid mayor, bailiffs, burgeſſes, and *commonalty* 'ſhall create, out of themſelves, coroners, &c.

'That none of the ſaid mayor, bailiffs, burgeſſes, and '*commonalty*, inhabiting within the ſaid town, ſhall be im-'pleaded without the ſaid town, except for ſuch treſpaſſes 'as ſhall be done againſt the Queen, or her heirs."

COUNSEL for the petitioners.

By this charter, the borough of Poole was erected into a county by itſelf, and its corporate name was changed; but the old royal charters were confirmed by it. The new charter was granted at the requeſt of the *inhabitants* to confirm and enlarge their privileges, and now they were formed into a ſeparate integral part, diſtinct from burgeſſes, by the name of the commonalty, (or, in the Latin, *communitas*.)

What has been ſaid of the ancient ſenſe of the word "*burgenſes*" or "*burgeſſes*" is true of that of the word "*commonalty*," which may, by the particular conſtitution and corporate name of a place, ſignify a reſtricted number, but, in its more proper and common acceptation, comprehends the whole body of the inhabitants.

The caſe already cited from Hobart (1), to ſhow that *inhabitants* are capable of incorporation, ſhows, likewiſe, that they may be incorporated by the name of commonalty. The charter, in that caſe, ſays, "That the *inhabitants* "ſhall be a *body corporate* by the name of provoſt, free bur-"geſſes, and *commonalty*." That they may vote for members of Parliament, by the name of commons, or commonalty, appears from the caſes of Bridport, 12 April, 1628 (2); and Warwick, 31 May, 1628 (3) (B).

That

(1) *Vide ſupra*, p. 120.
(2) Journ. vol. i. p. 882, col. i.
(3) Journ. ſame vol. p. 907. col. 2.

That commonalty (or *communitas*) means the *inhabitants* of Poole in the charter of the 10th of Elizabeth is clear, becauſe it was granted to, and at the requeſt of, the inhabitants; becauſe it confirms all former grants to the inhabitants; becauſe the *commonalty* are, throughout, diſtinguiſhed from the *burgeſſes*, the latter name being thenceforth confined to the ſelect burgeſſes, whoſe origin may probably be traced to the ſix mentioned in the charter of Longeſpee, although, in courſe of time, their number had been gradually encreaſed. In thoſe parts of the charter where the "*inhabitants*" is uſed and joined with "*commonalty*," it is only employed as being more explicit, but ſtill as deſcriptive of the ſame perſons.

EVIDENCE.

'The thirteenth charter, bearing date 24 Nov. 19 Car. 'II. (1668) contains a confirmation of all former privileges, 'and a grant of new ones, to the mayor, bailiffs, burgeſſes, 'and *commonalty*. This charter recites that the town of 'Poole had been, of old, incorporated, by the name of 'mayor, bailiffs, burgeſſes, and *commonalty*; and that the 'burgeſſes and *inhabitants* thereof, as well by that name as 'by *other names*, have uſed and enjoyed divers privileges, '&c.

'26 Car. II. An information, in the nature of *Quo Warranto*, iſſued againſt the corporation of Poole, by the 'name of mayor, bailiffs, burgeſſes, and *commonalty*, and 'their franchiſes were ſeized into the hands of the Crown. 'This *Quo Warranto* was produced to the Committee.

'30 Sep. 30 Car. II. The burgeſſes and *inhabitants* of 'the town of Poole preſented an addreſs and ſubmiſſion to 'the King, praying that they might be reſtored to their 'franchiſes. This was read.

'The fourteenth charter, 14 Jac. II. is a charter of re'leaſe, and reſtoration. After reciting the good ſervices 'of the burgeſſes, and *inhabitants* of Poole, it releaſes to 'the ſaid burgeſſes and inhabitants, as likewiſe to the may'or, bailiffs, burgeſſes, and *commonalty*, the judgments ob'tained againſt the ſaid mayor, bailiffs, burgeſſes, and 'commonalty, or *againſt the inhabitants, by the name of may'or, bailiffs, burgeſſes, inhabitants, and commonalty*, or any 'other name, or names, in Eaſter term, 26 Car. II. and

'Hilary

'Hilary term 2 Jac. 2; and it reſtores, and grants, to the 'ſame burgeſſes and *inhabitants*, as alſo to the mayor, bai- 'liffs, burgeſſes, and *commonalty*, all the liberties, &c. 'which the ſaid burgeſſes and *inhabitants*, or the mayor, 'bailiffs, burgeſſes, and *commonalty*, had, or by right ought 'to have had, before obtaining the ſaid judgment, by the 'name, or in the right, of the burgeſſes or *inhabitants*, or 'by what names ſoever the *incorporate body* was called; and 'that the *burgeſſes and inhabitants* of the ſaid town, for the 'time to come, might and ſhould be called one *body corpo-* 'rate and politick, in deed, form, and name, by the name 'of the *mayor, bailiffs, burgeſſes and commonalty* of the town 'of Poole; as alſo, all, and ſingular ſuch names as they 'lawfully had at the time of obtaining the judgment afore- 'ſaid. In a ſubſequent part, it grants that the burgeſſes 'and *inhabitants* of the ſaid town ſhould be gathered toge- 'ther in the uſual place *to make elections*, and do all other 'things requiſite and accuſtomed to be done.'

COUNSEL for the petitioners.

This charter demonſtrates, that the inhabitants were part of the ancient corporation; that "*commonalty*" and "*inhabitants*" were terms indiſcriminately uſed, as deſcriptive of the ſame perſons; and that the corporate name, of *mayor, bailiffs, burgeſſes, and commonalty*, comprehends the *inhabitants*.

Whatever act, therefore, imports to have been done by the mayor, bailiffs, burgeſſes and commonalty, muſt be taken to be the concurrent act of the inhabitants, and the ſelect part of the corporation.

It has been ſhown, that the arms, and conſequently the common ſeal, belong to the inhabitants; and that every inſtrument or deed, to which that ſeal is affixed muſt therefore be taken to be the act of the inhabitants (1). It remains to examine the *records* of the corporation, and the *returns* to Parliament, ſince the 10th of Elizabeth.

EVIDENCE.

'1ſt Entry] 14 June 10 Eliz. 1568, (and juſt before 'the charter of that year paſſed). It is agreed and conde- 'ſcended,

(1) *Supra*, p. 121.

'ſcended, that William Newman, now mayor of the town 'of Poole, with William Conſtantine and William Green, 'burgeſſes of the ſame town, being requeſted thereunto by 'the burgeſſes and *inhabitants* thereof, whoſe names are 'hereunder written, do ſue, labour, and travel (&c. to 'obtain a new charter), and we, the ſaid burgeſſes and 'merchants, do promiſe and bind ourſelves (&c. to anſwer 'all charges.) This record is ſubſcribed with about 80 'names.

'2d Entry.] 14 Sep. 1592. By the mayor, bailiffs, 'burgeſſes, and *commonalty*,—That the mayor, by himſelf, 'or with aſſiſtance, ſhall collect all the town-rents, dues, 'and revenues. This entry has a croſs drawn through it.

'3d Entry.] 26 Sep. 1592. An agreement of two col-'lectors, with the mayor, bailiffs, burgeſſes, and *commonalty* 'about collecting the revenues for that year.

'4th Entry.] 1642. An order of the mayor, bailiffs, 'aldermen, and *commonalty*, appointing ſix ordinary men 'of the *commonalty* to be watchmen.

'(☞ The diſtinction of aldermen, which occurs in many 'of the entries, does not imply any new integral part of 'the corporation. It only means ſuch burgeſſes as have 'ſerved the office of mayor. The ſame name is given to 'perſons of that deſcription in ſeveral other boroughs.)

'5th Entry.] 13 Oct. 1654. Concerning a compoſition 'with certain individuals for a tax upon brewing. This 'entry now ſtands in the name of mayor, bailiffs, and 'burgeſſes, but the word *commonalty* is evidently eraſed.

COUNSEL for the petitioners.

This aukward attempt ſhows, that it was underſtood by the ſelect part of the corporation, at the time when the raſure was made, that the word "*commonalty*,' in the corporate name, meant ſomething different from burgeſſes. The entry itſelf, when the word is reſtored, ſhows it, for it purports that the mayor, bailiffs, burgeſſes, 'and *com-'monalty*, (i. e. the whole corporate body) order, that the 'mayor, bailiffs, and burgeſſes, (i. e. a ſelect part) ſhall 'ſettle the terms of the compoſition.'

EVIDENCE.

EVIDENCE.

'6th Entry.] 20 Sept. 1661. Being election-day, ordered by the mayor, aldermen, and burgeſſes, that no perſon ſhall henceforth be made a burgeſs, without the conſent of the mayor, three aldermen, and eight other burgeſſes, inhabitants of this town.

'7th Entry.] 1668. At a common-hall aſſembled, 20 May, 1668, we, the mayor, aldermen, burgeſſes, and *commonalty* do, by this writing, oblige ourſelves to pay, &c. to our preſent miniſter. The word "*commonalty*," in this entry, is interlined, and in blacker ink than the reſt.

'8th Entry.] 1699. The mayor, bailiffs, burgeſſes, and *commonalty*, nominate and appoint Samuel Bond, eſquire, to be the recorder. This appointment is ſubſcribed with the name of the mayor, and a great many other names. The power of chooſing a recorder was granted and *confirmed* by the charter of the 19th of Charles IId. to the mayor, bailiffs, burgeſſes, and *commonalty*.

'Several other entries were read, but they were either to the ſame purpoſe with the foregoing, or were not relied on, in the arguments on either ſide.

'A petition was then produced by Mr. Speed, clerk of the Journals and papers, which is in the name of the mayor, bailiffs, burgeſſes, and *commonalty* of Poole, and bears date, and was preſented to the Houſe of Commons in 1758. It is ſubſcribed with a great many names; and Henry Auſtin, town-clerk of Poole, being ſworn, proved that Hadden, Cobb, and Nicolſon, three of the ſubſcribers, were only *inhabitants*, and not *burgeſſes*, at the time of their ſigning the petition.

'Then a deed of mortgage, dated in 1750, was produced, between the mayor, bailiffs, burgeſſes, and *commonalty* of the one part, and one Cobb, an inhabitant of Poole, on the other part, by which the ſaid mayor, bailiffs, burgeſſes, and *commonalty* mortgaged the market to the ſaid Cobb.'

COUNSEL for the petitioners.

In this deed, "*commonalty*" muſt mean *Inhabitants*, for the concurrence of the inhabitants was abſolutely neceſſary

to a mortgage of the market, ſince it was granted to *them* by the expreſs words of the charter of 3 Hen. VIII. (2).

EVIDENCE.

'The returns which the counſel for the petitioners pro-
'duced, poſterior to 10 Eliz. were as follow.

'1. 14 Apr. 14 Eliz. (1572.) This return is in the
'name of the mayor, ſenior bailiff, and J. M., W. N., &c.
'*(nominatim)* and many others, *free and lawful men* of the
'ſaid county, dwelling and reſiding electors.'

COUNSEL for the petitioners.

From this return it would ſeem, that, after the change which had lately happened in the conſtitution of the place, by which it was made a county, the idea was, that the election of the members of Parliament was to be by the *freeholders*. It ſerves, however, to ſhow, that there was no diſtinction made of this election, between burgeſſes and other inhabitants.

EVIDENCE.

'2. 28 Eliz. (1586). Between the mayor, bailiffs, bur-
'geſſes, and *commonalty*, and the ſheriff, &c.——The ſaid
'mayor, bailiffs, burgeſſes, and *commonalty* did chooſe, &c.
'—Under the ſeal of the mayor, bailiffs, burgeſſes, and
'*commonalty*.

'3. 30 Eliz. (1588.) Between the ſheriff and A, mayor,
'B, C, &c. *(nominatim)* and others, aldermen, burgeſſes,
'and *commonalty*, &c.——witneſſeth, that the ſaid mayor,
'aldermen, burgeſſes, and *commonalty* did elect, &c.——
'Under the common ſeal of the ſaid town of Poole.
'☞ This is the firſt return in which the word "*aldermen*"
'occurs (3).

'4. 18 Jac. I. (1621) between the ſheriff and A, the may-
'or, B, C, D, &c. *(nominatim)* and others, aldermen, bur-
'geſſes, and *commonalty*, &c. had elected, &c. In witneſs
'whereof we the ſaid mayor, aldermen and burgeſſes ſet
'our common ſeal of the ſaid town, &c. ☞ In the laſt,
'as

(2) *Vide ſupra*, p. 118

'as in this, the mayor, aldermen, and burgeſſes, are ſaid 'to have affixed the common ſeal.

'5. 1 Apr. 13. Car. II. (1661). Between R. S., ſheriff, 'and H. H, mayor, R. D., G. S., M. D., W. M., D. S., 'P. H., E. M., H. J., J. S., J. C., &c. and others, alder-'men and *burgeſſes inhabitants*——witneſſeth, that the ſaid 'mayor, aldermen, and *burgeſſes inhabitants* have choſen 'John Morton, Eſquire, and William Conſtantine, *their 'recorder*, to be their burgeſſes, &c.—In witneſs whereof 'the ſaid mayor, aldermen, and burgeſſes have, to this in-'denture, ſet their common ſeal.

'6. The ſame date) Between R. S., ſheriff, and H. H., 'mayor, W. S., R. C., J. W., P. H., W. M., &c. and 'others, aldermen and *burgeſſes* of the ſaid town and coun-'ty of Poole—witneſſeth, that we the ſaid mayor, aldermen, 'and burgeſſes aſſembled, &c.——And we the ſaid mayor, 'aldermen and burgeſſes have nominated and elected, &c. '—In witneſs whereof we the ſaid mayor, aldermen, and 'burgeſſes have to this indenture ſet our common ſeal,' &c.

COUNSEL for the petitioners.

The word "*commonalty*" is omitted in both theſe returns, and it appears by the records of the town, that the ſelect part of the corporation began their practices, about this period, to exclude the inhabitants, or *commonalty*, from the exerciſe of their rights as corporators. ☞ There are ſeveral raſures of the word "*commonalty*" in the corporation-books, which were produced to the Committee, beſides that mentioned in the entry of 13 Oct. 1654. (3).

It will appear afterwards, that the above double return was occaſioned by a conteſt between the *burgeſſes inhabitants* and the *out-burgeſſes*, in which the latter prevailed.

EVIDENCE.

'7. 11 Jan. 1 Will. and Mar. (1688-9. A certificate 'from Shadrach Beale, ſheriff, certifying, in anſwer to the 'Prince of Orange's letter, that Sir Nathaniel Napper, knight, 'and Henry Trenchard, Eſquire, were elected by the may-'or, bailiffs, and burgeſſes of the ſaid town and county,

(3) Supra, p. 131.

'according to the cuſtomary uſage for the election of mem-
'bers of Parliament.—Under the hand and ſeal of the ſaid
'ſheriff *(only.)*'

COUNSEL for the petitioners.

It is manifeſt, from the account given in the Journals, of the conteſt on occaſion of the laſt mentioned return, which was ſtated at the opening of this cauſe (4), that, at that time, both parties underſtood the word "*commonalty*" to mean the *inhabitants*.

EVIDENCE.

'8. 22 May, 7. Will. III. (1695). By indentures, be-
'tween George Leven, ſheriff, and Th. S., mayor, W. P.,
'ſenior bailiff, M. D., M. D., Shadrach Beale, W. S.,
'&c. and others, aldermen, burgeſſes, and *commonalty, in-
'corporated*, of the ſaid town and county, it is witneſſed,
'that the ſaid mayor, aldermen, and burgeſſes, and *com-
'monalty* have elected, &c. In witneſs whereof, we, the
'ſaid mayor, aldermen, and burgeſſes, to one of theſe pre-
'ſent indentures, have ſet the common ſeal of the ſaid
'town and county of Poole, &c.—Thomas Smith, mayor.
'Signed, ſealed, and delivered, in the preſence of, &c.
'There are twenty-ſix ſubſcriptions, and to four of them,
'after the name, is added "*a burgeſs*" in the ſame hand
'and ink with the name.

'The counſel for the petitioners admitted that, in all re-
'turns, ſince the year 1695, the word "*commonalty*" is
'omitted; and that, ſince that time, the *inhabitants* have
'never voted.'

COUNSEL for the petitioners.

As to the proceedings on the two conteſted elections in 1661, and 1668-9, nothing can be fairly inferred from the firſt, becauſe the *commonalty* do not ſeem to have been parties to the tranſaction, nor to have taken any ſhare in it (5) (C).

The

(4) *Supra*, p. 112, 113.
(5) 16 May, 1661. Journ. vol. viii. p. 251. col. i.

The event of the ſecond, (as it has been ſtated in a former part of the argument), cannot now be conſidered as a binding determination. It is, at moſt, the opinion of the Houſe, oppoſed to that of the Committee who tried the queſtion, and had the evidence and the arguments of counſel, to form their judgment upon. It is the opinion of the Houſe in the *Convention* Parliament, delivered in favour of the *Whig* candidate (1). But, even if we give it the credit of being a rational and wiſe diſſent from the reſolution of the Committee, it will be conſidered, that that reſolution was founded on the very ſcanty evidence of one return, whereas there has now been produced an irreſiſtible body of proofs, which were unknown to the Committee, and the Houſe, on that occaſion.

The return of 1695 demonſtrates that the proceedings in 1688-9 were not conſidered as concluſive againſt the right of the *commonalty*; and there is ſtill living a witneſs, who remembers the election in 1695, and who, by his teſtimony, will confirm what is proved by the return, that the *inhabitants* or *commonalty* voted at that election.

EVIDENCE.

'Thomas Shepheard, the witneſs propoſed to be called, 'was objected to.

'It was ſaid that, being an inhabitant, he was an intereſted witneſs.

'To this it was anſwered; That, where, from the nature 'of the caſe, no other evidence could be had, ſuch witneſſes as alone had been in a ſituation to be acquainted 'with the facts, ought to be admitted, otherwiſe the truth 'could never, in ſuch caſes, be diſcovered. That inhabitants were the only perſons likely to have paid attention 'to the fact which was meant to be proved by the teſtimony 'of Shepheard. That, in ſimilar caſes, courts of juſtice 'have admitted witneſſes to be examined, though circumſtanced (in point of intereſt) like him. As in the caſe of 'Willes and Harris, tried on the Weſtern circuit before 'Mr. Baron Eyre, (1774), when certain fiſhermen being 'called by the defendant, (who denied a right to the tithe of

(1) Quære.

'of fiſh as claimed by the plaintiff), their evidence was, 'on the part of the plaintiff), objected to, as they had an 'intereſt in overthrowing his claim; but the judge ſaid, 'that the objection proved too much, as it would deprive 'the plaintiff of the only means he could have of proving 'the cuſtom; and the evidence was admitted (D). It was 'alſo ſaid that Shepheard, (who had been on the pariſh 'three years), was diſqualified from voting, and therefore 'could derive no advantage from any evidence he might 'give in favour of the right of the inhabitants.

'The Committee over-ruled the objection.

'Thomas Shepheard being ſworn, gave his evidence to 'the following effect.

'He is 98 years of age. Remembers the election in '1695. Had been ſix years in Poole before that election. 'Was a gardener at that time. Mr. Aſhley was choſen by 'the mayor, burgeſſes, and *commonalty*. Has heard old 'people ſay that the *burgeſſes* kept the *commonalty* out of 'their rights. Voted *himſelf* in 1695. No oppoſition then. 'Remembers ſome other elections, (but could give no diſ-'tinct account of them). Went afterwards to ſea. Has 'offered his vote before he was on the pariſh, and has been 'ſolicited for his vote. Knows one Lee; (a perſon after-'wards called by the counſel for the ſitting members.) Is a 'good deal older than Lee; above four years.'

COUNSEL for the petitioners.

From the whole of the evidence ſince the 10th year of Queen Elizabeth, it appears, That, by the word "*commo-"nalty*," then introduced into the charters, is meant the *inhabitants*. That, in the charters, thoſe two expreſſions are uſed interchangeably. That the *inhabitants* have acted, in many inſtances, under the deſcription of *commonalty*. That elections and returns have been made by the mayor, bailiffs, burgeſſes, and *commonalty* down to the year 1695. Therefore, it muſt be underſtood that the *inhabitants* concurred in thoſe elections and returns.

Their right, therefore, is founded on the general common law of Parliament; is unimpeached by any original charter, or preſcriptive uſage; is ſupported, on the contrary, by uſage irreſiſtibly proved down to 1695, and is only oppoſed by an uſage of eighty years. But no charter, nor uſage,

uſage, however ancient, if within time of legal memory, can diveſt a right of election clearly proved to have exiſted before the date of ſuch charter, or the commencement of ſuch uſage.

The ſubſtance of the arguments of the counſel for the ſitting members, and of the new evidence which they produced, was as follows.

The common law right, as laid down in Glanville, may be admitted, as founded on general, political, and conſtitutional principles, which is the manner in which he ſtates it. But it cannot be ſupported as deduced from the hiſtory of Parliament. The early periods of repreſentation are too obſcure fully to authorize any general ſyſtem. The right of election in Poole does not depend on any of the charters which have been produced. It is preſcriptive. "*Burgenſes*," and "*Communitas*," the words employed in thoſe charters, may perhaps comprehend all the inhabitants in ſome boroughs, but certainly there are many more inſtances where they are uſed for a limited part (1) of the inhabitants. The ſenſe in which they are to be taken, in this caſe, muſt therefore appear from ſome arguments or evidence independent of the charters. It muſt be diſcovered by the uſage of the place.

"*Communitas*" is ill tranſlated "*commonalty*". It ſhould be tranſlated "*community*," which expreſſion never ſignifies all the inhabitants of a place. The Latin term, in old deeds, for *commonalty* is "*commonalitas*."

It appears that, in many of the charters which have been read, "*communitas*" is uſed in direct contradiſtinction to "*inhabitants*." If it is argued, that in thoſe charters, although both words are uſed, yet they mean the ſame thing, is it not as fair to ſay, that although in the corporate name both "*burgenſes*" and "*communitas*" are employed, yet *they* mean one and the ſame thing; or rather that "*communitas*" is a general cumulative word, comprehending a ſort of recapitulation of the ſeparate integral parts ſpecified in the antecedent part of the corporate name?

Indeed, arguments merely drawn from the vague and inaccurate expreſſions of old charters have very little ſolidity. The tautology of thoſe inſtruments is remarkable to a proverb. And it would be in vain to look for legal preciſion in thoſe

(1) Several inſtances of this were cited.

thoſe of a vice-admiral of England, in the reign of Henry the Eighth, or of Clarencieux king at arms, in the time of Queen Elizabeth.

It is the opinion of ſome great lawyers, that *inhabitants* as ſuch are incapable of being corporators. The caſe of Dungannon, which has been cited by the counſel on the other ſide, ſeems to ſhow, that they cannot; for the charter to the inhabitants of Dungannon, was determined to be void, by the opinion of all the other judges againſt Lord Hobart. (12 Co. Rep. p. 121.) And they held that inhabitants have not capacity to take an inheritance. (*Ibid.*) (E).

The agreement for obtaining the charter is only an act of the perſons there ſpecified, as *individuals*, not as *corporators*. The exerciſe of the right of common by the inhabitants of Poole has not been proved.

If there could be an incorporation of inhabitants as ſuch, and if the inhabitants of Poole are really entitled to certain corporate rights and franchiſes, under the charters which have been given in evidence, it does not therefore follow, that they have a right to vote for members of Parliament. That right, in this borough, does not (as has been ſaid already,) depend on any charters. It muſt be diſcovered by the uſage.

EVIDENCE.

'Twelve returns were produced in the name of the mayor, bailiffs, and burgeſſes *(only)*.

'1. 12 Nov. 26 Eliz.

'2. 1 Car. I.

'3. 3 Car. I.

'4. 1 March, 13 Car. I.

'5. 23 Feb. 25 Car. II.

'6. 3 March, in the ſame year.

'7. 6 Feb. 31 Car. II.

'8. 18 Aug. 31 Car. II.

'9. 28 Feb. 33 Car. II.

'10. 2 Will. & Mar.

'11. 4 Nov. 1695. In the ſame year with, but poſterior 'to, the return laſt produced by the counſel for the petitioners.

'12. 10 Aug. 1698.

'To

'To all thoſe returns, as well as to thoſe ſince 10 Eliz. 'produced on the part of the petitioners, after the ſecond, 'the common ſeal is affixed.

'On an examination, by the agents on both ſides, of 'the names in the body of the return of 18 Jac. I. (which 'was the fourth produced by the counſel for the petitio- 'ners) it appeared, that two of the perſons there named 'were not to be found entered as *burgeſſes*, in the corpora- 'tion-books of that time.

'Two witneſſes were called.

'William Lee, aged 87, or 88, ſwore, that he had often 'heard Shepheard ſay, that he was but three or four years 'older than him. But he had firſt known him only about 'fifty one years ago, long after they were both men. He 'ſaid he had known Poole ſeventy years, and that all elec- 'tions of mayors, ſheriffs, and parliament-men, had been, 'during that time, by *burgeſſes*.'

'Mrs. Greenway, aged ſeventy-nine, remembers the elec- 'tion in 1704, when Mr. Weſton (her uncle) was choſen. 'He was choſen by the *burgeſſes*. She never heard of the '*inhabitants* voting. Her firſt huſband was a *burgeſs*.'

COUNSEL for the ſitting members.

The evidence of the two laſt witneſſes, who never heard of the claim of the *inhabitants*, is ſufficient to overturn the teſtimony of Shepheard, if indeed any truſt could be put in what he has ſaid, after telling the Committee that he voted in 1695, although, by his own account, he was a minor at that time, and by Lee's, not above thirteen years of age.

But if *inhabitants* did vote in 1695, as there was no conteſt, and therefore no enquiry into their titles, this cannot prove that their voting as ſuch was allowed on that occaſion. There is a return of that year, ſubſequent to that produced by the counſel for the petitioners, in the name of the *mayor* and *burgeſſes* only, and the number of returns in the name of *mayor*, *bailiffs*, and *burgeſſes*, which have been read, from the reign of Queen Elizabeth downwards, through the courſe of the laſt century, when *they* contended, that they uniformly run in the name of the mayor, bailiffs, burgeſſes, and *commonalty*, ſhows, that in thoſe where the word "*commonalty*" is uſed, it ought to be interpreted, to be

be nothing elſe but a cumulative name of the foregoing integral members of the corporation.

All the returns are ſealed with the common ſeal, and there is no inſtance of a common ſeal belonging to *inhabitants* at large.

In 1688-9 the *inhabitants* claimed the right to vote, and the Houſe then diſallowed their claim.

There is no appearance of their having ever attempted it before. In the caſe of 1661 there is not a word ſaid of their pretended right. The recorder of the town, who was one of the candidates, and was ſupported by the *inhabitant burgeſſes*, would ſurely have availed himſelf of the votes of the inhabitants at large, if he had thought there was any pretext that they had a right to vote. He had then been recorder twenty years. (☞ This was proved from the books.) Therefore we muſt ſuppoſe that, during that time, the inhabitants had never been conſidered as entitled to vote, and, in fact, never had voted. This carries the uſage up to 1641, (*i. e.* 140 years ago;) and this being oppoſed by nothing but uncertain argument and implication, muſt be conſidered as evidence of preſcriptive uſage.

The ſitting members might reſt their cauſe on this ground, but they are entitled to the benefit of the deciſion in 1688-9, which, for the reaſons given at the opening of the cauſe, ought to be conſidered as a determination within the meaning of the ſtatute.

In reply, the counſel for the petitioners anſwered the arguments which had been uſed on the other ſide, and enlarged upon and enforced thoſe formerly employed in favour of the right of the inhabitants, at great length.

It was ſaid,

If "*communitas*" were to be tranſlated "*community*," that word would comprehend the inhabitants, as well as *commonalty*.

"King Edward the Fourth, by a patent letter, granted "to the burgeſſes and *inhabitants* of New Windſor, that "they ſhould be a body, and perpetual corporate *communi*-"*ty*. Madox Firma Burgi, p. 28, 29."

This inſtance, among many others, ſhows likewiſe that *inhabitants* may be a corporation.—The Caſe of Abingdon, 23 May, 1660 (3) is a determination of the Houſe of Commons

(3) Vide ſupra, Caſe of Pontefract, vol. i.

mons that they may. If ſo, they have a common ſeal, which is only a badge of incorporation, and it is moſt evident, from the charter of Clarencieux, in the reign of Queen Elizabeth, that the common ſeal of Poole belongs to the inhabitants. If the common ſeal belongs to them, the returns produced on the part of the ſitting members are, in law, to be conſidered as acts in which the inhabitants concurred, as much as if the words "*inhabitants*" or "*commonalty*" had been uſed in thoſe returns.

The right of common, herbage, and turbary, as enjoyed by the inhabitants of Poole, under grants to *burgeſſes*, has been proved in a manner ſufficient to ſatisfy any one who will not ſhut his eyes to the truth. "*Commonalty*," therefore, in the latter, and "*burgeſſes*" in the more early charters and returns of this borough, are proved to mean "*inhabitants*."

The argument built on the ſuppoſed inaccuracy of old charters would, if taken in its full extent, invalidate thoſe charters entirely. It is only from the fair conſtruction of the terms and deſcriptions in ſuch charters that we can diſcover the perſons to whom the grants, contained in them, are made; and although a vice-admiral, or a king at arms, cannot, either in the days of Henry the Eighth, or Elizabeth, be ſuppoſed to have been able to pen a legal inſtrument with preciſion, no more than they probably can in our own, yet we muſt ſuppoſe that, where very important privileges and immunities were in queſtion, (as in the charter of Arthur Plantagenet) they then had, as they certainly could have, the aſſiſtance of very able lawyers, in drawing the inſtruments which were to convey or confirm thoſe privileges.

The counſel on the other ſide have ſaid that, in ſome of the charters, the words "*commonalty*" and "*inhabitants*" are both uſed and diſtinguiſhed from each other; but, if there are a few paſſages in ſome of them which ſeem to favour that aſſertion, they muſt be aſcribed to an over anxiety to uſe as general and comprehenſive terms as poſſible. In the charter of 10th of Queen Elizabeth, the *mayor, bailiffs, burgeſſes and commonalty*, and their ſucceſſors, and all *other* inhabitants and burgeſſes of Poole are exempted from toll, paſſage, bridgage (5), &c. It may as well be contended that

(5) *Supra*, p. 125.

that "*other burgeſſes*" implies a different claſs of men from "*burgeſſes*" in the firſt part of that ſentence, as that "*inhabitants*" was intended to mean ſomething different from "*commonalty.*"

The petition of 1758, in the name of the mayor, bailiffs, burgeſſes, and *commonalty*, and ſigned by ſeveral inhabitants, (not burgeſſes), and the mortgage of the market, in the name alſo of mayor, bailiffs, burgeſſes and *commonalty*, and in which the inhabitants muſt have concurred, afford arguments, which have not been attempted to be anſwered, that in the corporate name of this borough, the word "*commonalty*" comprehends "*inhabitants.*"

On Wedneſday, the 29th of March, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the two ſitting members were duly elected (6).

(6) Votes, p. 454.

NOTES

NOTES

ON THE CASE OF

POOLE.

PAGE 122. (A).

CASE of Colcheſter.

" 28 March, 1628. Report made from the Committee of " privileges by Mr. Hackwill.—

" For Colcheſter: only one return made by the bailiffs, in " which Sir Tho. Cheeke and Mr. Alford returned. That " the bailiffs, aldermen, and common council, conſiſting of " 42, in an upper room, read the writ, and there elected Sir " Thomas Cheeke, and Mr. Alford: In a lower room, the " common ſort of burgeſſes in general elected Sir Thomas " Cheeke and Sir William Maſham.—

" That the bailiffs, &c. made their preſcription by election, " as they now made it.—

" Againſt this alledged, that till Richard the Firſt no bai- " liffs; from thence till Edward the Fourth no common coun- " cil. Then 16 appointed, by a new charter, which, by the " conſtitutions ſithence, they have encreaſed to—

Upon this the preſcription holden inſufficient.—

" That the Committee alſo of opinion, that the election of " Sir William Maſham good; and Sir William Maſham's " name to be put in *by the bailiff* (1), inſtead of Mr. Alford.

" Upon queſtion, Sir William Maſham duly elected; and " Sir William Maſham his name to be, by one of the bailiffs " now in town (2), inſerted in the indenture of return, in the " place of Mr. Alford. Which accordingly preſently done at " the board." Vol. i. p. 876. col. 2. 877. col. 1.

CASE

(1) *Vide ſupra.* Vol. I. p. 90, &c. Introduct. Note (W).

CASE of Boſton.

" 8 May, 1628. Mr. Hackwill reporteth from the Com-
" mittee of privileges, the caſe of Boſton in Lincolneſhyre.
" —Mr. Bellingham the recorder, and Mr. Okeley choſen.
" The queſtion whether a ſelect number, or the commonalty
" were to chuſe. Sir A. Irby choſen by majority of voices
" of the *commonalty*, and fourteen of the ſelect number (2).

" Agreed by the Committee, that the election of burgeſſes,
" in all boroughs, did, of common right, belong to the com-
" moners; and that nothing could take it from them, *but a*
" *preſcription, and a conſtant uſage beyond all memory*..

" 1. Upon queſtion, the right of election for burgeſſes, to
" ſerve in Parliament, for Boſton, reſteth in the *commonalty*,
" and not in the mayor, aldermen, and common council.

" 2. Upon queſtion, Mr. Okely not duly elected or re-
" turned.

" 3. That Sir An. Irby duly elected, and ought to have
" been returned.

" 4. That the mayor of Boſton ſhall be ſent for, to put out
" Mr. Okeley's name, and put in Sir. A. Irby's." Vol. i. p. 893. col. 2.

Theſe caſes apply exactly to ſhow, that no uſage within time of memory can narrow the right of election.

P. 125. (B).

CASE of Bridport.

" 12 April, 1628. Mr. Hackwill reporteth from the Com-
" mittee for privileges, the caſe of the borough of Bridport.—

" The queſtion, whether the commons, or only the [two]
" bailiffs, and 13 capital burgeſſes, are electors [there; the]
" laſt claiming that ſole power by preſcription, ** this proved
" by 2 witneſſes for 40 years, *** claimed it, but were de-
" nied. A certificate of diſclaimer, under the hands of 80
" commoners, offering to juſtify it upon oath; and affirmed,
" they could have proved it by 40 commoners more.—

" On the other part, records produced: 10, 6o *Ed.* VI.
" Indenture returned the election to be *per ballivos, per aſſen-*
" *ſum communitatis.* 20 & 30 *Phil.* & *Mar.* election returned
" *accordant.* 10 *Eliz. accordant.* 10 *Jac.* accordant.

" This alſo proved by two witneſſes: Above 40 commoners
" gave voices, 10 *Jac.*

" Another,

(2) In the printed Journal in this place there is the following note at the bottom of the page.

In the margin is written by the clerk. " *Quære* the report at large of Mr. Hackvill."

" Another, that about 60 years ago the commoners had " voice; and that he himſelf, then a commoner, gave voice.

" Affirmed by one of the members of this Houſe, that one " of the now bailiffs confeſſed to him, the commoners had " voice.—

" Replied to this, that the addition of the commonalty; be- " cauſe that the name of the corporation: That ſo they make " their leaſes, yet the commoners never meddle.—

" Exception to one of the witneſſes, that a commoner, and " a very aged man, ſcarce could hear or be heard: That the " other had been diſfranchiſed, and therefore ſpake out of " ſpleen,—

" Alledged further, that 1 *Jac.* the commons called, be- " cauſe they were to contribute to Mr. Pitt's wages.—

" Agreed by major part of the Committee, that the com- " moners had voices in the election.

" Reſolved alſo here, no good election; becauſe the com- " mons having right of voice, had no warning; as they ought " to have had.

" Upon queſtion, the *commonalty* in general ought to have " voices in the election of the burgeſſes for the Parliament.

" Upon queſtion, the election void, in reſpect of the want of " warning to the commonalty. A new writ for a new election." Journ. vol. i. p. 882. col. 1, 2.

At a future period the Houſe reſolved, (2 March 1762) " That in the laſt determination of this Houſe, of the right " of election of members to ſerve in Parliament for the borough " of Bridport, in the county of Dorſet, made the 12th day of " April, 1628; which is as followeth; " That the commo- " nalty in general, &c." The words commonalty in general," extend only to *inhabitants houſholders* paying ſcot and lot. Journ. vol. xxix. p. 204. col. 2. p. 205. col. 1.

This explanation of the word " *commonalty*" is exactly that which the counſel for the petitioners contended for in the preſent caſe.

Case of Warwick.

" 31 May, 1628. Mr. Hackwill reporteth from the Com- " mittee for privileges, &c. the caſe of Warwicke.—Queſtion, " whether the election to be made by the mayor and common " council, or by the commons in general (1).

" That

(1) In the printed Journals there is the following note at the bottom of the page.

" (a) *In the margin is written by the clerk,* " *Quære* the report of Mr. " Hackwill.

" That a petition produced, whereby about 200 commoners " diſclaim to have any right of election; but that refuſed to be " accepted by the Committee, becauſe, if but one commoner " appear to ſue for his right, they will hear him.

" Upon queſtion, the right of election, for the town of " Warwicke, belongeth to the *commonalty*." Journ. vol. i. p. 907. col. 2.

" On a future occaſion the Houſe reſolved, (31 Jan. 1722-3,) " that the right of election of burgeſſes to ſerve in Parliament " for the borough of Warwick, is in ſuch perſons only who " pay to church and poor in the ſaid borough." Vol. xx. p. 114. col. 2.

Here too by this ſecond reſolution it appears, that the word " *commonalty*" in the firſt has been underſtood to mean *inhabitants*. There were ſeveral returns produced in 1723, of a date poſterior to the reſolution of 1628, which run thus, " *Burgenſes* " *& inhabitantes elegerunt*." Journ. *ibid.* col. 1.

P. 132 (C). The entry of that Caſe is as follows: 16 May, 1661. " Serjeant Charlton reports from the Committee of " privileges and election, touching the double return for the " town of Poole, That John Morton, Eſq. and William Con- " ſtantine, Eſq. are returned by one indenture; and John " Morton, Eſq. and Sir John Fitzjames by another indenture; " and all by the chief officers; and the opinion of the Com- " mittee, that both Mr. Conſtantine and Sir John Fitzjames " do forbear to ſit in this Houſe, till the merits of the cauſe " touching their elections be determined." The Houſe agreed with the reſolution of the Committee. Vol. viii. p. 251. col 2.

" 15 June, 1661. Serjeant Charleton made report from the " ſaid Committee, touching the difference between William " Conſtantine, Eſq. and Sir John Fitzjames, Knt. concerning " their elections for the town of Poole in the county of Dor- " ſett; that the firſt queſtion before them was, whether the " out-burgeſſes of the ſaid town of Poole had voices as well " as the in-burgeſſes; and the opinion of the Committee, that " the out-burgeſſes had equal voices in the elections with the " in-burgeſſes, and that the ſecond queſtion being, who had " the majority of voices, it appeared, that Sir John Fitzjames " had much more the majority of voices, and was duly elected " one of the burgeſſes for the ſaid town of Poole; and the opi- " nion of the Committee, that the ſaid Sir John Fitzjames " was duly elected one of the burgeſſes of the ſaid town of " Poole, and ought to ſit.

" Reſolved, That this Houſe agree with the ſaid Committee, " that Sir John Fitzjames was duly elected one of the burgeſſes

" for

" for the ſaid town of Poole, and ought to ſit in this Houſe." Journ. ſame vol. p. 272. col. 1.

P. 134. (D). The gentleman who cited that caſe, and was counſel in it, on the circuit, has favoured me with the following ſtate of it, It was a cauſe which originated in the Exchequer, upon a bill brought by the plaintiff as impropriator of tithe, in the pariſh of St. Keavine, in Cornwall. The court directed an iſſue, which was tried at the ſummer aſſizes in 1774, before Mr. Baron Eyre. Several fiſhermen being called on the part of the defendant, to prove the manner of tithing fiſh, their evidence was objected to by the counſel for the plaintiff, they having an intereſt to negative the claim. The judge overruled the objection, upon the ground ſtated in the preſent caſe. The counſel for the plaintiff then objected to any witneſſes being admitted who had followed the occupation of fiſhermen within ſix years, as within that time they were liable to be called upon to pay the tithes, if the plaintiff were to ſucceed. This objection was allowed by the judge, who ruled, that no witneſſes, who had followed the occupation of fiſhermen within ſix years from the day of their examination, ſhould be admitted.

P. 136. (E). If the caſe of Dungannon, as reported in the 12th part of Lord Coke's Reports, p. 121. (which, by the bye, is not of equal authority with the other parts which were publiſhed by himſelf, and by Lord Hobart, p. 15. is attentively conſidered, and compared with what Lord Holt is made to ſay in the caſe of Aſhby and White, both by Lord Raymond (1) and Salkeld (2), it will appear, that both thoſe caſes are in favour of the capacity of the *inhabitants* of a place, as ſuch, to be made a corporation. Lord Hobart thought, in the caſe of Dungannon, that the King might *ordain* (diſtinguiſhing between *that* and *granting*) that the inhabitants of any place, without their being previouſly incorporated, ſhould ſend members to Parliament. This was the point on which all the other judges differed from him, according to Lord Coke's account of the caſe; and Lord Holt, in Aſhby and White, only adopts their opinion upon this point. Lord Coke, indeed, goes on to ſay, that it was ſo holden, " Becauſe *inhabitants* have not capacity " to take an inheritanve;" but, from the context, it is clear that this muſt mean " *inhabitants not incorporated*;" and it is not ſaid, either by Coke or Holt, that inhabitants may not be incorporated; nor even, that, if incorporated, they could not then, as a corporate body, be capable of a grant to chooſe members to Parliament. The caſe of Dungannon was ſhortly this: The King conſtituted the town of Dungannon to be a free borough by a charter, in which was the following clauſe: " *Et*

(1) 2 Lord Raymond, p. 951. (2) 3 Salk. p. 18.

" *ulterius volumus declaramus, & conſtituimus quod inhabitantes* " *villæ predictæ ſint unum corpus corporatum, per nomen præpo-* " *ſiti, 12 burgenſium, & communitatis Dungannon, et per idem* " *nomen placitare poſſint, & quod ipſi prædicti præpoſitus, & bur-* " *genſes, & ſucceſſores ſui habeant poteſtatem eligendi duos burgen-* " *ſes, &c. ad Parliamentum, &c.* The doubt (ſaid Lord " Coke) was, whether this grant of election of burgeſſes of " parliament was good, for becauſe it was granted but to par- " cel of the body, *ſcil.* to the provoſt and burgeſſes, and not to " the provoſt, burgeſſes, and commonalty." It was holden that the grant muſt be to the whole body, although the exerciſe might be limited to a partial number of that body. (Lord Raym. 952.) This ſhews that the legal creation of the whole body was not queſtioned. As the grant was to a partial number of the corporation, it was conſidered as if it had been to a number of individuals; and the principle of the determination was, that a congregate number of individuals, though called *præpoſitus & burgenſes*, could not take an inheritance. To illuſtrate this, the queſtion of a grant to *inhabitants*, as ſuch a *congregate number of individuals*, was introduced, and, according to that principle, *they* certainly could not take an inheritance.

How far the right to ſend members to Parliament is ſuch an inheritance, or real right, (as Holt otherwiſe expreſſes it,) of which *inhabitants* not incorporated are incapable, is very queſtionable. Lord Holt, in Aſhby and White, lays it down, that the right of voting in a borough, when that right is derived from preſcription, is a real right, attached to the burgage lands; and that ſince the time of legal memory, the King cannot grant it to inhabitants in general not incorporated. But experience ſhows, that there are places where the *inhabitants* have acquired that right within time of memory, though not incorporated—Weſtminſter is one. The learned Editor of the new Edition of Lord Coke's Commentary has collected a great deal of very curious materials relating to the legal hiſtory, and antiquities of that city, with which I hope he will, ſome time or other, oblige the public. In his manuſcript, part of which I have peruſed, he demonſtrates, that the city and liberty of Weſtminſter is not, and never was, a corporation; yet the privilege of ſending members to parliament was not enjoyed by Weſtminſter till the 1ſt of Edward the Sixth. (See Willes's Not. Parl. vol. i. p. 7. of the Preface.) The other part of Lord Holt's doctrine, viz. That, in boroughs ſending members to Parliament by preſcription, the right of voting is only in thoſe poſſeſſed of burgage lands, is diſcuſſed in the Caſe of Pontefract, *ſupra*, vol. i.

XIX. THE

XIX.

THE CASE

Of the BOROUGH of SHAFTON, otherwiſe SHAFTESBURY, In the County of DORSET.

The Committee was choſen on Tueſday, the 28th of March, and conſiſted of the following Gentlemen.

Sir George Yonge, Bart. Chairman,	Members for	Honiton
John Peach Hungerford, Eſq.		Leiceſterſhire
Henry Watkin Daſhwood, Eſq.		Wigtown, &c.
Sir George Robinſon, Bart.		Northampton
Abel Smith, Eſq.		Aldbo. Yorkſh.
James Sutton, jun. Eſq.		Devizes
Sir John Duntze, Bart.		Tiverton
William Drake, jun. Eſq.		Agmondeſham
Francis Anneſley. Eſq.		Reading
Hon. George Venables Vernon,		Glamorganſh.
Aſheton Curzon, Eſq.		Clitheroe
Rowland Holt, Eſq.		Suffolk
Sir Richard Worſley, Bart.		Newp. Hants
NOMINEES.		
Of the Petitioners,		
Lord Guernſey.		Maidſtone
Of the Sitting Members,		
George Clive, Eſq.		Biſhop's caſtle

PETITIONER.

Hans Wintrop Mortimer, Eſq.

Sitting Members.

Francis Sykes, Eſq. Thomas Rumbold, Eſq.

COUNSEL

For the Petitioner,

Mr. Hardinge, Mr. Macdonald.

For the Sitting Members,

Mr. Wilſon, Mr. Arden; and Mr. Potter (in Mr. Wilſon's abſence.)

THE CASE

Of the BOROUGH of SHAFTON, otherwiſe SHAFTESBURY.

ON Wedneſday, the 29th of March, the Committee being met, the petition was read, ſetting forth; That the two ſitting members by themſelves, and their agents, had been guilty of many groſs and notorious acts of bribery, and corruption, whereby many of the voters were influenced to give their votes for them; and that the returning officer had admitted perſons not duly qualified to vote for the ſitting members, and had rejected the legal votes of others, who had tendered them for the petitioner (1).

The laſt determination of the Houſe was read, and is as follows:

29 February, 1695-6, Reſolved, "That the right of "election of burgeſſes to ſerve in Parliament for the bo-"rough of Shatſbury, in the county of Dorſet, is only in "the inhabitants of the ſaid borough, paying ſcot and lot "(2)."

Then the ſtanding order of the 16th of January, 1735-6, was read (3).

The numbers on the poll, as produced by the mayor, were,

For Sykes,	284
For Rumbold,	248
For Mortimer,	122

The

(1) Votes, 6 Dec. 1774. p. 34. 35.
(2) Journ. vol. ii. p. 479, col. 1, and 2.
(3) *Supra*, vol. i. p. 51.

The two objects of the counſel for the petitioner, in this cauſe, were to prove,

1. That the ſitting members, by themſelves or their agents, had been guilty of bribery, ſo as not to be entitled to retain their ſeats.

2. That there were ſo many of the voters for the ſitting members affected by bribery, or not *bona fide* inhabitants, or who had not paid ſcot and lot, that by ſtriking them off the poll, a majority muſt remain in favour of the petitioner, and he be entitled to be declared duly elected.

The counſel for the ſitting members, beſides endeavouring to defeat the evidence produced on the two foregoing heads, attempted to ſhow, that Mortimer had promiſed money in order to procure himſelf to be elected, and that he was thereby incapable of ſitting, even if he ſhould make out a majority of good votes.

It is evident, from this ſhort account of the general complexion of the cauſe, that, with regard to each candidate and agent, and each individual voter objected to, a diſtinct iſſue was joined, between the parties, *viz.* with regard to the candidates, "*guilty of bribery or not*;" with regard to "the ſuppoſed agents, "*agent or not*;" and alſo "*guilty of* "*bribery, or not*;" and with regard to the voters, *bribed, or* "*not*;" "*bona fide inhabitant, or not*;" *paying ſcot and lot,* "*or not.*"

On each of theſe iſſues, the Committee, in the capacity of a jury, were to find a verdict; and, upon comparing the reſult of thoſe verdicts, muſt have formed their ultimate determination.

There were, however, ſeveral points ſtarted with regard to the meaning and effects of the law concerning bribery; but from the manner in which the cauſe was conducted, it is impoſſible to diſcover with certainty, by the event, what the opinion of the Committee was upon thoſe points. The counſel indeed formed their conjectures, but, as thoſe conjectures can be of no authority, it would be improper to inſert them here. The principal queſtions on the ſubject of bribery, which were argued by the counſel in this and the other cauſes, where there was occaſion to go into that ſubject, will find a place, in a note ſubjoined to the caſe of St. Ives (1).

In

(1) Vide *infra*, Caſe of St. Ives, note (B).

In the courſe of the trial, (which, from the time of the appointment of the Committee, to that of their making their report to the Houſe, laſted four weeks,) many points of evidence aroſe, and were argued by the counſel. Some of them were as follow:

Money, to the amount of ſeveral thouſand pounds, had been given among the voters, in ſums of twenty guineas a man. The perſons who were entruſted with the diſburſement of this money, and who were chiefly the magiſtrates of the town, fell upon a very ſingular and very abſurd contrivance, in hopes of being able thereby to hide through what channel it was conveyed to the electors. A perſon, concealed under a ludicrous and fantaſtical diſguiſe, and called by the name of Punch, was placed in a ſmall apartment, and through a hole in the door, delivered out to the voters, parcels containing the twenty guineas; upon which they were conducted to another apartment in the ſame houſe, where they found a perſon called Punch's ſecretary, and ſigned notes for the value, but which were made payable to an imaginary character, to whom they had given the name of Glenbucket. Two of the witneſſes, called by the counſel for the petitioner, ſwore that they had ſeen Punch through the hole in the door, and that they knew him to be one Matthews, an alderman of Shafteſbury, and, as the counſel for the petitioner had endeavoured to prove, an agent for the ſitting members.

The counſel for the ſitting members propoſed to call Matthews himſelf, to prove an *alibi*.

This was objected to, and the point being argued,

The Committee reſolved,

Not to admit the evidence.

On the part of the petitioner, witneſſes were called to prove declarations of voters, who at the poll had taken the bribery oath, that they had received Punch's money.

This was objected to by the counſel on the other ſide. They ſaid,

That this was not legal evidence, for that, if ſuch declarations were proved, ſtill they could not be conſidered as proving the receipt of the money. That it would be unjuſt to ſuffer what a man had ſaid in converſation, and without an oath, to invalidate what he had ſolemnly ſworn. That in the two Caſes of the counties of Hertford and Surrey, where there was a queſtion of evidence exactly ſimilar

to

to this, the Committee of elections had come to the following reſolution.

16 January, 1695-6, Reſolved, "That it is the opinion "of this Committee, that evidence ought not to be admit-"ted to diſqualify an elector, as no freeholder, who, at "the election, ſwore himſelf to be a freeholder."

And, in both caſes, the Houſe agreed to the reſolution of the Committee (1).

To this it was anſwered,

That thoſe caſes proved too much, for that, if the doctrine which they contain were to be adopted, it would be in an elector's power, by committing perjury, to preclude all enquiry into the legality of his vote (A).

The evidence was admitted.

The Committee alſo determined, in this caſe, as had been done in that of Hindon, That, with regard to ſuppoſed agents, evidence ſhould be firſt produced to eſtabliſh the agency, before the bribery by ſuch perſons ſhould be gone into (2)

The whole of the evidence may be ſeen in the report, as it was printed for the uſe of the Houſe.

On Thurſday, the 13th of April, the houſe adjourned on account of the Eaſter holidays, till Tueſday, the 25th of the ſame month (3), but the Committee continued ſitting, according to the proviſions of the act of Parliament (4), till they agreed on their report, which they did on Thurſday, the 20th of April, the counſel having cloſed their evidence and arguments on the Saturday before.

On Tueſday, the 25th of April, being the firſt day on which the Houſe met after the holidays, the Committee, by their Chairman, informed the Houſe, that they had determined;

That the two ſitting members were not duly elected.

And that Hans Wintrop Mortimer, Eſquire, the petitioner, was duly elected, and ought to have been returned.

And the names of the two ſitting members were accordingly raſed out of the return, and that of Mr. Mortimer inſerted (5).

"Sir

(1) Journ. vol. xi. p. 393. col. 2. 394. col. 1.
(2) *Vide ſupra*, Caſe of Hindon, vol. 1. p. 89.
(3) Votes, p. 561.
(4) *Vide* Introduction, ſect. iii. No. 32, vol. i. p. 28.
(5) Votes, p. 565, 566.

"Sir George Yonge alſo reported, from the Committee, "that they had come to ſeveral reſolutions, which they "had directed him to report to the Houſe; and he read "the report in his place, and afterwards delivered it in at "the table, where the ſame was read, and the reſolutions "of the Committee are as follow,

"Reſolved, That it appears to this Committee, that "there was the moſt notorious bribery, and corruption, at "the laſt election of members, to ſerve in this preſent "Parliament, for the borough of Shafton, otherwiſe "Shafteſbury, in the county of Dorſet.

"Reſolved, That it is the opinion of this Committee, "that the ſaid bribery and corruption require the moſt ſeri-"ous conſideration of Parliament (1).

The conſideration of the report was adjourned till Thurſday the 4th of May, and an order made, that the Speaker ſhould not iſſue his warrant for a new writ (for the vacant ſeat) till after that day (2).

On the 4th of May, ſeveral parts of the minutes of the evidence taken before the Committee being read, both the reſolutions of the Committee were unanimouſly agreed to by the Houſe, and it was ordered, that the Speaker ſhould not iſſue his warrant for a new writ, until the Houſe had proceeded to take the minutes of the examination taken before the Committee into further conſideration.

Then the two following reſolutions were come to,

"Reſolved, That it appears to this Houſe, that it is too "late to proceed to take the ſaid minutes into further con-"ſideration in this ſeſſion of Parliament.

Reſolved (unanimouſly) "That it will be highly expe-"dient, that the Houſe do proceed, to take the ſame into "conſideration, as early as poſſible, in the next ſeſſion of "Parliament."

And, it was ordered,

"That it be an inſtruction to the gentlemen, who are "appointed to prepare and bring in a bill, to explain and "amend an act, made in the 10th year of the reign of his "preſent Majeſty, intituled, An Act to enable the Speaker "of the Houſe of Commons, to iſſue his warrants, to make "out new writs, for the choice of members to ſerve in "Parliament, in the room of ſuch members as ſhall die "during

(1) Votes, p. 566. (2) Votes, *Ibid.*

" during the receſs of Parliament (1), " that they do make " proviſion in the ſaid bill, that no writ be iſſued for the " borough of Shafton, otherwiſe Shafteſbury, in the coun- " ty of Dorſet, by virtue of the ſaid act, during the next " receſs of Parliament (2).

That *very* day leave had been given to bring in ſuch a bill (3), which was afterwards brought in and paſſed into an act, (15 Geo. III. cap. 36) (4), and it is thereby provided, that, if a vacancy happen for Shafteſbury during the receſs, (by any of the events in the caſe of which the Speaker, by that ſtatute, and the ſtatute of 10 Geo. III. cap. 41. is authorized and required to iſſue a warrant for a new writ,) the Speaker ſhall not be enabled to iſſue a new writ (B), " becauſe *that* might tend to defeat thoſe mea- " ſures which it may be proper to take in conſequence of " the ſaid notorious bribery and corruption (5)." The former part of the ſame ſection recites, " That it has ap- " peared to the Houſe of Commons that there was the moſt " notorious bribery and corruption at the laſt election for " Shafteſbury."

(1) *Vide ſupra*, Introd. vol. i. p. 40.
(2) Votes, p. 627, 628.
(3) Votes, p. 624.
(4) *Supra*, Introduction, vol. i. p. 40.
(5) Sect. 4.

NOTES

NOTES

ON THE CASE OF

SHAFTESBURY.

PAGE 151 (A.) There is a determination of the Houſe poſterior in time, on this very point of evidence, in the caſe of the county of Bedford, directly contrary to the reſolution in the caſes of Hertford and Surrey.

" 28 June, 1715. A motion being made, and the queſtion " being put, that the counſel for the petitioners be admitted to " give parole evidence as to a perſon's being no freeholder, " who ſwore himſelf to be a freeholder at the time of the " election ;"

" It paſſed in the affirmative, on a diviſion, 98 to 66." Journ. vol. xviii. p, 190. col. 1.

The ſtanding order of the Houſe, of 22 Nov. 1717 (1). by which it is declared that a man's qualification to be a member of Parliament, may be diſputed, although he ſhall have previouſly ſworn to it, is alſo in direct contradiction to the principle of the two caſes of Hertford and Surrey ; ſo that thoſe caſes cannot have any weight, although the Sollicitor General was chairman, and made the report, in the caſe of Hertford. Journ. vol. xi. p. 393. col. 2.

P. 153. (B). A Clauſe of this ſort was not neceſſary with regard to Hindon, becauſe the election for *both* ſeats having been declared void, no vacancy could happen during the receſs,

(1) *Vide infra.* Caſe of Clackmannan.

XX.

THE

CASE

Of the BOROUGH of

HASLEMERE,

IN THE COUNTY OF SURREY.

The Committee was choſen on Friday, the 31ſt of March, and conſiſted of the following Gentlemen.

Paul Fielde, Eſq. Chairman,	Members for	Hertford.
John Elwes, Eſq.		Berkſhire.
Chriſtopher Griffith, Eſq.		Berkſhire.
John Morgan, Eſq.		Monmouthſh.
William Nedham, Eſq.		Winchelſea.
Hon. James Stuart,		Bute and Caith.
William Philips, Eſq.		Boroughbridge.
Viſcount Bulkeley,		Angleſea.
Sir Adam Ferguſon, Bart.		Ayrſhire.
Sir George Macartney, K. B.		Ayr, &c.
Filmer Honywood, Eſq.		Steyning.
Sir Henry Hoghton, Bart.		Preſton.
Edward Phelips, Eſq.		Somerſetſhire.
NOMINEES, *Of the Petitioners,*		
Right Hon. Thomas Townſhend,		Whitchurch.
Of the Sitting Members,		
Robert Henley Ongley, Eſq.		Bedfordſhire.

PETITIONEES.

William Burke, Eſq. and Henry Kelly, Eſq.

Certain Inhabitants Freeholders, and legal Voters of the Borough of Haſlemere.

Sitting Members,

Thomas More Molyneux, Eſq. Sir Merrick Burrell, Bart.

COUNSEL

For the Petitioners.

Mr. Cox, Mr. Alleyne, and (on his return from the circuit), Mr. Bearcroft.

For the Sitting Members.

Mr. Wilſon, Mr. Arden.

THE

CASE

OF THE BOROUGH OF

HASLEMERE.

ON Saturday, the 1ſt of April, the Committee being met, the two petitions were read

That of Mr. Burke and Mr. Kelly alledged in general terms; That the two ſitting members had been guilty of undue and illegal practices; That votes had been admitted, though not legal, for the ſitting members, and that the majority of legal votes were in favour of the petitioners (1).

The other petition ſtated ſpecially the right of election in Haſlemere as determined by the Houſe, and that it is a borough by preſcription, and alledged; That of late years the practice of ſplitting and dividing freeholds, within the ſaid borough for election purpoſes, hath prevailed to ſo great a degree, that, if the ſame is not remedied, and effectually preven ed for the future, the privileges and franchiſes of the petitioners will be deſtroyed, and the ancient and true conſtitution of the ſaid borough totally ſubverted; and that at the laſt election, when Mr. Burke, Mr. Kelly, and the ſitting members, were candidates, great innovations were made on the ancient and true right of election of the ſaid borough; and a great numbers of perſons admitted to vote for the ſitting members, in reſpect of freeholds illegally ſplit and divided; and ſeveral perſons who were not inhabitants of the borough, others not freeholders, others who pretended freeholds were parcel of the waſte ground of the ſaid

(1) Votes, Dec. 6. p. 35.

ſaid borough and manor, others whoſe freeholds do not lie within the ſaid borough and manor, and ſeveral perſons receiving alms, were admitted to vote for the ſitting members, contrary to the right of election; and that Mr. Burke and Mr. Kelly had the majority of legal votes, and ought to have been returned (2).

The laſt determination of the right of election, in Haſlemere, is as follows:

May 20, 1661. Reſolved, "That the inhabitant free-"holders there (*i. e.* in Haſlemere, have only voice in elec-"tions (3)."

This was explained by a reſolution of the Houſe in 1755.

24 April, 1775. Reſolved, "That, in the laſt determi-"nation of the Houſe, of the right of election of burgeſſes "to ſerve in Parliament for the ſaid borough of Haſlemere, "in the county of Surrey, made the 20th day of May, in "the year 1661, which is as followeth, *viz. That the inha-"bitants freeholders there have only voice in election*; by the "word "*freeholders*" is meant only freeholders of meſſua-"ges, lands, or tenements, lying within the borough *and* "manor of Haſlemere, whether the ſame *pay* rent to the "lord of the ſaid borough and manor, or not, excluſive of "any lands or tenements which are or have been parcel of "the waſte ground of the ſaid borough and manor, or any "meſſuages or buildings which are or ſhall be, ſtanding or "being thereon (4)."

(☞ It is underſtood not to be neceſſary that the voters ſhould *occupy* the freeholds for which they vote. It is enough that they live in Haſlemere, and have freeholds there.)

At the beginning of this very tedious cauſe, the counſel for the petitioners were going into evidence, tending to ſhew that only perſons paying, or who, from their tenure, were liable to pay, a rent to the lord, have a right to vote. It is eſſential to burgage tenements that they pay a rent to the lord, ſo that this would have made Haſlemere a burgage-tenure borough. The counſel for the ſitting members objected

(2) Votes, 6 Dec. 1774. p. 35, 36.
(3) Journ. vol. viii. p. 255. col. 1.
(4) Journ. vol. xxvii. p. 293. col. 2.

objected to the evidence, as contradicting the explanatory reſolution of 1755.

The counſel for the petitioners contended,

That by the words "whether the ſame *pay* rent to the "lord of the ſaid borough and manor or not," was only "meant whether they *de facto* pay or not," but that it was ſtill competent to them to ſhew, by evidence, that none can vote, but thoſe who *ought*, by the nature of their tenure, to pay to the lord.

On the other ſide it was ſaid,

Thatthe words of the reſolution mean "perſons bound by law to pay," for that the Houſe muſt be ſuppoſed to have preſumed that perſons who were bound to pay, did pay, and therefore that to ſay, "*Whether the ſame pay, or* "*not*," was the ſame thing as to ſay, "*Whether the ſame are* "*holden by paying or not*," or "*Whether the freeholders are* "*bound to pay, or not.*"

The Committee, having directed the court to be cleared, after deliberation among themſelves,

Reſolved, That the counſel for the petitioners ſhould not be admittted to produce evidence, tending to ſhow that only perſons *paying*, or *liable to pay*, a rent to the lord, have a right to vote.

The numbers, on the returning officer's poll, ſtood as follow:

For the ſitting members - - -	61
For the petitioners - - -	40
Majority	21

The counſel for the petitioners objected to 47 of the voters for the ſitting members, on ſeveral different grounds.

I. To 35, as voting for the tenements ſplit within the meaning of the ſtatute of King William (5).

II. 6 As claiming their right from freeholds without the manor.

III. 1 His property being leaſehold, and part of the waſte.

IV. 2 As having no intereſt but a rent reſerved on a term.

V. 3 As not having freeholds.

VI. To

(5) 7 & 8 Will. III. cap. 25. § 7.

VI. To 6 of the above they likewiſe objected the receipt of a charity called Smith's charity.

VII. And to ſome, in opening their caſe, bribery; but this laſt objection they thought proper afterwards to wave.

From this ſtate of their objections, and from thoſe of the counſel on the other ſide to the votes of the petitioners, which will be mentioned afterwards, it will appear, that the cauſe divided itſelf into a great variety of ſeparate queſtions, which, however, were not ſeparately argued and decided, as has been practiſed in ſome of the foregoing caſes. Each queſtion was accompanied with a great deal of complicated evidence, both parol and written, which would have required a very cloſe attendance in order to collect and digeſt it; and, after all, the labour would have been as fruitleſs, as difficult and irkſome, ſince the nature of the cauſe was ſuch as rendered it impoſſible to deduce from the general determination of the Committee, their opinion on the particular points. I confeſs, therefore, that I was neither able nor very deſirous to obtain a complete hiſtory of the whole. It may have its uſe, particularly to perſons connected with this borough, to ſtate the general points both of evidence and argument, as I was able to gather them, from the opening of the counſel on each ſide, and from the information with which they have ſince favoured me.

On the firſt head of objection, the counſel for the petitioners contended,

1. That all freeholds of which an unity of tenement can be proved till 1696, when the ſtatute of King William paſſed (6), but which have ſince been divided, are to be conſidered as ſplit within the meaning of that ſtatute, and are therefore incapable of carrying legal votes.

2. Or, that they are, at leaſt, *prima facie*, to be preſumed to have been divided for election purpoſes, and the votes to be holden to be void, the *onus* of proving the contrary falling upon the voter.

3. Or, that, from the time that thoſe diviſions of freeholds can be proved to have become very general in any place, they are to be conſidered as within the operation of the ſtatute.

Or, *prima facie*, to be preſumed to be ſo.

5. Or,

(6) For the words of the ſtatute, *vide ſupra*, vol. p. 108. Caſe of Downton.

5. Or, laſtly, (if even that were thought too broad a propoſition) that all votes for freeholds divided about the time of an election are, *prima facie*, to be taken to be within the meaning of the ſtatute, and that the voter muſt prove the diviſion to have been made *bonâ fide*, and not to ſerve the purpoſe of the election.

They cited the caſes of Whitchurch, and of Weymouth and Melcombe *Regis*.

In the former, the Houſe came to the following reſolution, which is the laſt determination with regard to the right of election in that place.

21 December, 1708. Reſolved, "That the right of elec-
" ting burgeſſes to ſerve in Parliament for the borough of
" Whitchurch, in the county of Southampton, is in the
" freeholders only of lands, or tenements, in right of
" themſelves, or their wives, not ſplit ſince the act of the
" ſeventh and eighth years of the reign of King William
" (1)."

In the caſe of Weymouth and Melcombe *Regis*, evidence having been given that, from the time of the election previous to that which was then controverted, a great many diviſions of freeholds had been made, the Committee came to a reſolution, 3 June, 1714,

"That no freeholders of the borough of Weymouth and
" Melcombe *Regis*, in the county of Dorſet, made ſince
" the election of members to ſerve in Parliament for the
" ſaid borough, in April, 1711, unleſs claiming by deviſe
" or deſcent, had any right of voting in the laſt election of
" members to ſerve in Parliament for the ſaid borough (2)."

They ſaid, that on the foundation of this reſolution, the Committee decided in favour of the petitioners, which deciſion having been adopted by the Houſe (3), proves, by neceſſary implication, that the Houſe alſo adopted the previous reſolution. The firſt of thoſe caſes, they ſaid, proved their firſt general poſition, and the other the third.

A great deal of evidence was produced to ſhow, that the 35 votes objected to upon the ground of the ſtatute of King William, came within one or other of their poſitions with regard to the operation of that ſtatute.

The

(1) Journ. vol. xvi. p. 52. col. i.
(2) Journ. vol. xvii. p. 665. col. 2.
(3) Journ. ſame vol. p. 667. col. 2.

The ſecond head of objection, which went to 6 of the votes for the ſitting members, depended on evidence of the bounds of the manor, and whether the manor is, or is not, co-extenſive with the borough.

The counſel for the petitioners endeavoured to prove that they are not co-extenſive; and they contended that, to come within the deſcription of the reſolution of 1755, the freehold muſt lie in both, the word "*and*" in that reſolution, being *copulative*, and not *diſjunctive*.

The 3d, 4th, and 5th heads of objection ſeem to have been clearly ſupported by the words of the reſolution of 1755, ſo that, with regard to the votes impeached under thoſe heads, the queſtion muſt have been merely on the fact of the property having been ſuch as the counſel for the petitioners ſtated it to be.

The 6th head of objection was the receipt of Smith's charity.

Mr. Bray, ſteward of that charity, gave the following account of it.

In the reign of Charles the Firſt, one Henry Smith, of Silver-ſtreet, London, left all his real and perſonal eſtates to truſtees, to be diſtributed from time to time to a great many different pariſhes, particularly to all thoſe in Surrey but three, for the ſetting of the *poor* to work, for the binding poor apprentices, and teaching and educating poor children. The rents of this donation at preſent amount to about 1600 pounds a year. In moſt pariſhes entitled to a ſhare of them, that ſhare is paid to the overſeers of the poor, and it is underſtood by the truſtees that they are to diſtribute it to ſuch poor pariſhioners as do not receive the ordinary pariſh relief. The overſeers make a return to the truſtees of the perſons who have received the charity.

Upon this evidence, the counſel for the petitioners contended,

That this charity was in the nature of alms, or pariſh relief, being ſubſtituted inſtead thereof, to thoſe who are objects of parochial aſſiſtance, and diſtributed by the ſame perſons. That this diſtinguiſhed it from other charities, which, in different caſes, had been determined not to diſqualify, and that though *alms* are not mentioned in the laſt determination of the right of election of Haſlemere, they muſt be conſidered as working a diſqualification by the common law of Parliament. That although there are ma-

ny determinations of the Houſe reſpecting particular places, where the diſqualification by alms is ſpecially mentioned, we cannot from thence infer, that, with regard to others, where it is not mentioned, it does not operate; for, if this were ſo, it would certainly have been ſaid in ſome one inſtance, in direct terms, that perſons receiving alms are not thereby diſqualified; but that no ſuch inſtance is to be found. That the Houſe, in the determinations where alms are mentioned, can only be conſidered to have meant them as declaratory of the general law, for that, upon an examination of many of the caſes where ſuch determinations have been made, it will be found, that they were not formed on any evidence of a peculiar uſage in the place.

☞ The witneſſes ſwore, that they had never heard that the receipt of Smith's charity was conſidered, in the borough, as a diſqualification; and, on the other hand, they did not remember any inſtances of perſons, whom they knew to have received it, coming to poll.

The counſel for the ſitting members inſiſted, on the firſt head,

That if a man, at this day, were to purchaſe, *bona fide*, for the purpoſe of habitation, or any other lawful uſe, a part of a larger freehold from which it had never before been divided, it would carry a good vote with it, in this borough. That, if the counſel for the petitioners were right, to the whole extent of their doctrine, every conveyance of ſuch ſmaller freehold, which had never been a ſeparate eſtate before 1696, would be void; for, by the ſtatute, the conveyances themſelves, which are deſcribed in it, not merely the votes, are declared to be void (1).

That, till the ſtatute of the 10th of Queen Anne, cap. 23. which altered the law, in this reſpect, with regard to freeholds in counties, the ſtatute of King William extended to them; and that, by neceſſary inference from the doctrine of the counſel for the petitioners, all conveyances of ſmaller freeholds carved out of larger, whether in towns, or boroughs, (where the right of voting is in freeholders) or in counties, from 1695 to 1711, muſt be ſuppoſed to have been void. That the law ſtill continues ſo with regard

(1) See the words of the ſtatute cited *ſupra*, in the Caſe of Downton, vol. i. p. 108.

gard to boroughs; ſo that by the ſtatute of K. William, every proprietor of ſuch larger freehold in a borough would ſtill be tied up from ſelling part of his eſtate without the whole.

That this doctrine drew with it ſuch monſtrous conſequences, that it could not be ſeriouſly maintained. That it ſeemed to have been taken up, upon the idea that this was a burgage tenure borough, where burgages, being indiviſible as to the right of voting annexed to them, cannot be ſplit into more votes than they originally bore.

That the two caſes of Whitchurch and Weymouth, and the propoſitions founded upon them, militate againſt each other; for that the latter proves that the principle of the former is not to be extended to all boroughs; That, with regard to the firſt, there is none of the evidence, on which the determination was made, ſtated in the Journals: That, as to the ſecond, it ſeems from the whole account of it in the Journals, (in which account, by the bye, there are a great many inaccuracies), that the reſolution of the Committee was formed upon the ground of occaſionality in the votes which had been made ſince 1711; That it only ſays, that ſuch votes were bad, at the election then under the conſideration of the Committee, not that every new vote that ſhould ever be made after 1711 ſhould be ſo. That, beſides, although the general determination of the Committee, as to the perſons entitled to ſit, was agreed to by the Houſe, we are not, therefore, to conſider the previous reſolution as a reſolution of the Houſe; for that, when the Houſe adopts any ſpecial reſolution of a Committee, it is always *ſpecially* agreed to, which was not done on that occaſion.

That even the more moderate part, of what the counſel for the petitioners contended for, could not be admitted, being contrary to the eſtabliſhed maxim, that fraud is not to be preſumed. That, at the time when many of the conveyances in the preſent caſe were made, triennial Parliaments were in uſe; ſo that moſt conveyances of all ſorts muſt, at that period, have been made near the time of an election.

That it was now too late to object to freeholds which had been voted for as ſeparate tenements for 30, 40, 50, or 60 years. (☞ This was proved to be the caſe of many of thoſe which had been objected to). That, if they had been fraudulently conveyed, the time to object to them

was when the tranſaction was recent, and could have been enquired into, which indeed had been attempted in 1751, againſt many of them, but without ſucceſs (1).

That the number of inhabitants in Haſlemere had encreaſed greatly within this century, which afforded a fair preſumption, that the tenements had been divided, for the fair purpoſe of habitation. (☞ They gave up ſome of their votes objected to on this firſt head.)

On the ſecond head, They contended that the borough and manor are co-extenſive.

One piece of evidence, to prove this, was, That in the court-rolls, as long as there was a court-baron held at Haſlemere, the title was "*Burgus de Haſlemere.*"

This, they ſaid, ſhewed that the borough and manor are the ſame; for that a court-baron can only belong to a manor, and therefore the title "*Burgus*" could not have been uſed in the court-rolls of the manor, if the borough had been ſomething different from the manor.

They contended, on the ſixth head of objection, that, Smith's *charity* is not *lms*; for that by that word the Houſe means only pariſh relief. That in the caſe of Cirenceſter in 1690, the Committee of elections having reſolved that a charity called bye-money, exactly analagous to that in queſtion, being diſtributed by the pariſh officers, and given to ſuch as do not receive pariſh relief, diſqualified, the Houſe *diſagreed* (2). That even pariſh relief is not a general diſqualification, for that there is no inſtance where the Houſe, in determining the right of election in any particular place, has *expreſsly* mentioned any *general* diſqualification, or ſaid, for inſtance, infants, women, peers, have no right to vote.

The counſel for the ſitting members then proceeded to their objections to the voters for the petitioners; which were as follow:

1. To ſome, as having voted for tenements ſplit for election purpoſes, within the meaning of the ſtatute of King William.

2. To others, as having voted under fraudulent conveyances, having never been in poſſeſſion, and not having any beneficial intereſt in their ſuppoſed eſtates.

☞ Theſe two objections went to about 24 votes.

3. To

(1) *Quære.*

(2) Journ. vol. x. p. 461. col. 1, 2.

3. To 1. as having received parish relief, (if the Committee should think that a disqualification.)

4. Their last objection went to all the other votes for the petitioners, and to some of those objected to under the first head. The facts on which it was founded were these:

The late Mr. Webb, Sollicitor to the Treasury, by his last will, bearing date the 6th of February, 1770, devised his estates, real and personal, to his wife, and her heirs, executors, and assigns, but subject to the payment of his debts; which were considerable, particularly to the Crown. He died soon after.

On the 6th and 7th of August, 1771, by indentures of lease and release, between Mr. Webb's widow of the one part, Edward Beaver of the other, and Dr. Halifax and Richard Blyke of the third part, after reciting that a marriage was intended between Mrs. Webb and Mr. Beaver, Mrs. Webb conveyed part of the real and personal estates, to which she was entitled under the will of her late husband, to Halifax and Blyke, and their heirs, and assigns, in trust, to pay out of the rents and produce of the real, and the produce of the personal estate, all the debts of the testator, and also six thousand pounds to her intended husband, and, from and after the payment of the debts and the six thousand pounds, upon trust to convey to such uses, as she (notwithstanding her coverture) should appoint, by a deed or will, and, if she should die without making such appointment, to the use of her heirs, executors, and assigns. The marriage took place.

On the 5th and 6th of May, 1774, Halifax and Blyke, in consideration of ten shillings, bargained and sold, to Beaver and his assigns, all the messuages, lands, and tenements, lying within the borough and manor of Haslemere, for life.

Mr. Beaver, by subsequent deeds, but previous to the election, conveyed to the different voters objected to, freehold tenements, for which a nominal consideration in money (specified in the conveyances) was paid.

From the whole of the circumstances just stated, the counsel for the sitting members argued,

That the conveyances by Beaver must be considered as colourable and fraudulent, and that the Committee must set aside the votes given in consequence of them. That the conveyance, by Halifax and Blyke to Beaver, was contrary to,

to, and a breach of, the truſt to them. That if the eſtate which they had granted was good, *in law*, yet, certainly, Beaver only took the bare *legal* eſtate, ſubject to the truſts, of which he had notice by being a party to the firſt deed, and that he could not, therefore, convey any beneficial intereſt to the voters.

The counſel on the other ſide, in their reply, ſaid, on this head,

That, by the conveyance of May, 1774, Beaver clearly took a *legal* eſtate of freehold, and that the voters, in like manner, by his conveyances to them, took *legal* eſtates, and acquired *bona fide* freeholds in their tenements; and, therefore, that the right of voting, annexed to thoſe freehold tenements, veſted in them.—That the Committee had no juriſdiction ſimilar to that of a court of equity, to inveſtigate the truſts to which the eſtates of the freeholders might be ſubject.

On Wedneſday, the 12th of April, the Chairman of the Committee acquainted the Houſe, that the Committee had received an application from the petitioners, and ſitting members, to deſire that the Committee would move the Houſe, for leave to adjourn during the receſs at Eaſter, as ſuch an adjournment would be of great convenience to the parties, in the further hearing of the merits of the cauſe, and that the Committee were deſirous of adjourning for ſome days during the receſs, and had, therefore, directed him to move the Houſe, that the ſaid Committee might have leave to adjourn till Friday, the 28th of April.

On this, the Houſe was moved that the act of the 10th of George the Third, cap. 16, ſhould be read, which being accordingly done, it was ordered "That the ſaid "Committee have leave to adjourn till Friday the 28th of "April (1)."

On Tueſday, the 9th of May, the Committee, by their Chairman, informed the Houſe, that they had determined, That the two ſitting members were duly elected (2).

XXI. THE

(1) Votes, p. 542, 543.

(2) Votes, p. 653.

XXI.

THE

CASE

Of the COUNTY of

CLACKMANNAN,

In SCOTLAND.

☞ The day appointed for chooſing this Committee was Tueſday, the 4th of April (1); but the Houſe not being complete, according to the proviſions of the ſtatute (2), they were obliged to adjourn to the day following (3), although very important buſineſs was to have come on, after the ballot.

On Wedneſday, the 5th of April, the Committee was choſen, and conſiſted of the following Gentlemen.

Frederick Montagu, Eſq. Chairman,	Members for	Higham Ferrers
Sir George Saville, Bart.		Yorkſhire
Hon John Vaughan,		Berwick
Charles Goring, Eſq.		Shoreham
Lord John Cavendiſh,		York
Thomas Halſey, Eſq.		Hertfordſhire
William Chaſin Grove, Eſq.		Weymouth, &c.
Richard Benyon, Eſq.		Peterborough
Hon. Booth Grey,		Leiceſter
James Grenville, jun. Eſq.		Buckingham
Thomas George Skipwith, Eſq.		Warwickſhire
Richard Wilbraham Bootle, Eſq.		Cheſter
Edward Bacon, Eſq.		Norwich
NOMINEES		
Of the Petitioner.		
William Adam, Eſq.		Gatton
Of the Sitting Member.		
Lord Adam Gordon.		Kincardineſhire

PETITIONER.

James Francis Erſkine, Eſq.

Sitting Member.

Ralph Abercromby, jun. Eſq.

COUNSEL

For the Petitioner.

Mr. Maddocke, Mr. Croſbie.

For the Sitting Member.

Mr. Rae, Mr. Macdonald.

(1) Votes, 27 March, p. 438.
(2) *Vide ſupra*, Introd. ſect. 3. No. 11, p. 24.
(3) Votes, 4 April, p. 485.

THE CASE

Of the COUNTY of CLACKMANNAN.

ON Thurſday, the 6th of April, the Committee being met, the petition was read, ſetting forth; That the ſitting member *was abſolutely diſqualified and ineligible*; That the petitioner had a majority of legal votes; And, that the return of the ſitting member was brought about by various illegal and unwarrantable acts, and proceedings (1).

The counſel for the petitioner inſiſted,

That, as the qualification of the ſitting member was expreſsly objected to in the petition, he ought to have given in a *particular* of his eſtate to the clerk of the Houſe, within 15 days after the petition was read, according to the following ſtanding order:

22 November 1717. "The perſon whoſe qualification "is expreſsly objected to in any petition relating to his "election, ſhall, within fifteen days after the petition is "read, give to the clerk of the Houſe of Commons a pa- "per, ſigned by himſelf, containing a rental, or particular, "of the lands, tenements, and hereditaments, whereby "he makes out his qualification; of which any perſon con- "cerned may have a copy (2)."

That there is another ſtanding order (the 4th) of the ſame date, in the following words:

"If

(1) Votes, 7 Dec. 1774. p. 42.
(2) Journ. vol. xviii. p. 629. col. 1.

"If any ſitting member ſhall think fit to queſtion the "qualification of a petitioner, he ſhall, within fifteen days "after the petition read, leave notice thereof in writing, "with the clerk of the Houſe of Commons, and the peti- "tioner ſhall, in ſuch caſe, within fifteen days after ſuch "notice, leave with the ſaid clerk of the Houſe the like "account, being in writing, of his qualification, as is re- "quired from a ſitting member (2)."

That in the caſe of Minehead, 27 Feb. 1728, one of the petitioners having neglected to comply with this laſt mentioned order, the Houſe ordered the Committee of elections not to proceed upon that part of the petition which concerned him (3) (A). That, as the one ſtanding order is equally binding with the other, they were perhaps entitled to inſiſt, by analogy to that caſe, that the ſitting member in the preſent inſtance, was to be *preſumed* to be diſqualified. But they ſaid they waved any advantage of that ſort, and only deſired, that the particular of the eſtate by which he claimed his qualification, ſhould now be produced to the Committee.

The counſel for the ſitting member anſwered, that, in the firſt place the general words in the petition "abſolutely *diſqualified and ineligible*" were not ſufficiently explicit to ſhow that the objection intended to be made, was to the ſitting member's eſtate, which, however, was the only ſort of qualification meant by the ſtanding order; that, for aught the ſitting member could learn from the petition, the diſqualification meant might be ſomething elſe, as the holding a diſabling office, &c. That the agent for the ſitting member having ſerved a written notice on the petitioner's agent, on the 22d of March, to know the particular grounds on which the petitioner intended to proceed, no anſwer in writing had been obtained. (☞ This was proved.)

And, in the ſecond place, they contended, that qualifications for Scotland were not within the meaning of the ſtanding order of 1717, as was evident from comparing all the four reſolutions of that date together, which by a fifth, extending to them all, are made ſtanding orders. That from this circumſtance it was plain, that they were all meant to apply to the ſame ſubject. That the firſt clearly only

(2) Journ. vol. xviii. p. 629. vol. 1.
(3) Journ. vol xxi. p. 66. col. 2.

only extended to England, becauſe it refers to the qualification-oath taken at the election for Engliſh members of Parliament under the ſtatute of the 9th of Queen Anne (4). It is in the following words:

Reſolved, "That, notwithſtanding the oath taken by any "candidate, at, or after, any election, his qualification "may afterwards be examined into."

That, conſequently, the other three, in like manner, only reſpected England.

As to the requiſition now made, of producing the *particular* of the fitting member's eſtate to the Committee, they ſaid, that, in order to anſwer it, it would be neceſſary to ſtate the origin and nature of qualification in Scotland.

Before the reign of James the Firſt of Scotland, all freeholders, who held of the King in chief, were *entitled* to ſit in Parliament, or rather, to ſpeak according to the ideas of thoſe times, they were *bound* to attendance there.

By a ſtatute of the 7th Parliament of that Prince (5), *anno* 1427, the leſſer barons and free tenants were *permitted* to ſend two or more commiſſioners from each ſhire, to repreſent them. Kinroſs and Clackmannan, being very ſmall ſhires, were only to ſend one each. When a commiſſioner was not elected, it continued to be the duty of the leſſer barons and free tenants to attend in perſon.

Still no qualification, farther than being a freeholder, (that is, holding of the King or Prince of Scotland, for ſuch only are called ſo,) was requiſite either in the electors or elected.

In 1587, in the 11th Parliament of James the Sixth (6), it was enacted, that none ſhould have voice in the election of commiſſioners, but perſons having forty ſhillings a year in land, and being reſident within the ſhire. But nothing was yet expreſsly preſcribed as a qualification neceſſary for the elected, except reſidence.

In 1661, a new ſtatute paſſed on this ſubject (7), by which it was provided, that, beſides all heritors holding a forty ſhillings land *in capite*, all heritors, like renters, and wadſetters, holding of the King, and whoſe yearly rent amounted

(4) Cap. 5.
(5) Cap. 101.
(6) Cap. 114. p. 629, c. l. 1.
(7) 1ſt Par. of Car. II. cap. 35.

amounted to ten chalders of victual, or 1000 pounds (Scots,) all fee-duties deducted, ſhould be capable of voting, and of *being choſen.*

Twenty years afterwards, the qualification, which is required by law at this day, was eſtabliſhed (8), *viz.* That all perſons entitled to vote, ſhould be publickly infeft in lands, or the ſuperiority of lands (B), holding of the King or Prince, of forty ſhillings old extent (C), or, where the ſaid extent appears not, in lands liable for the public ſupplies for 400 l. of valued rent diſtinct from duties (D). Reſidence was made no longer neceſſary.

☞ There is no expreſs proviſion in this laſt ſtatute with regard to the elected. But it follows by neceſſary inference from the tenor of it, that they were to have the ſame qualification with the electors. By the ſtatute of the 16th of George II. cap. 11. § 10. perſons choſen when abſent muſt ſwear to their having ſuch qualification, before they take their ſeat.

It was enacted, that, on a certain day (therein ſpecified), all thoſe in every county, qualified as above, ſhould meet at the head borough of their county, and make up a roll containing their names, and the extent or valuation of their names; and that every year afterwards, they ſhould meet at the Michaelmas head-court, in order to reviſe the roll, and make ſuch alterations in it, as were neceſſary, from the changes of circumſtances which might have occurred ſince their laſt meeting (9).

The ſame alterations were to be made, if neceſſary, at the meeting for chooſing a commiſſioner to Parliament; and if any objections were taken to any one's being on the roll, or being excluded from it, either at the Michaelmas, or election-meeting, and were not removed to the ſatisfaction of the objectors, they were to be ſtated in an inſtrument, for the purpoſe of laying them before the Parliament; or, if no Parliament was ſitting, a particular diet was to be appointed, by the meeting, for the court of ſeſſion to determine ſummarily upon the matter (1).

Thus the law ſtood with regard to the manner of queſtioning the qualification of freeholders, till the 16th year of the

(8) An. 1681. 3d Par. of Car. II. cap. 2.
(9) 3 Par. Car. II. cap. 2.
(1) 3 Par. Car. II. cap. 2.

the late King, when a ſtatute paſſed, containing a great many new regulations, concerning elections, both for the counties and boroughs of Scotland.

One of the proviſions of that ſtatute was as follows:

"If any perſon ſhall be inrolled, whoſe title ſhall be "thought liable to objection, it ſhall and may be lawful "for any freeholder ſtanding upon the roll (whether ſuch "freeholder was preſent at the meeting, or not) who ap-"prehends that ſuch perſon had not a right to be inrolled, "to apply by *complaint* to the court of ſeſſion, ſo as ſuch "application be made within *four kalendar months* after "ſuch enrollment; and the ſaid court, after ſervice of "ſuch complaint, on thirty days notice, [now reduced to "15 days, by 14 Geo. III. c. 81. §. 1.] upon the perſon "ſaid to be wrongfully admitted to the roll, ſhall, [in a "ſummary way, proceed to] hear and determine [on ſuch "complaint] and if no ſuch complaint ſhall be exhibited "within the time aforeſaid, the freeholder inrolled ſhall "ſtand and continue upon the roll until an alteration of "his circumſtances be allowed by the freeholders at a ſub-"ſequent Michaelmas meeting, or meeting for election, "as a ſufficient cauſe for ſtriking, or leaving him out of "the roll (2)."

The following facts were proved, or admitted.

Mr. Abercromby has ſtood on the freeholders' roll of Clackmannanſhire, ever ſince the Michaelmas head-court in 1759. At the laſt meeting for the laſt election, the petitioner objected to him, on the ground of an alteration of circumſtances; but the objection was then over-ruled. Four months had elapſed ſince that time before this Committee was choſen, and no complaint had been made to the court of ſeſſion.

The counſel for the ſitting member argued, That now all the qualification neceſſary to be produced by him was his name on the roll; That either the Houſe of Commons ſince the 16th of George the Second, had no juriſdiction with regard to the right of freeholders to ſtand on the roll, becauſe the complaint allowed by the ſtatute is only directed to be made to the court of ſeſſion, or that, at leaſt, they are bound by the limitation in the ſtatute; and as no complaint had been lodged, within four months after the meeting

(2) 16 Geo. II. cap. 11. §. 4.

ing for election, it was no longer competent to any juriſdiction whatever, to entertain any enquiry on the ſubject. That the limitation was eſtabliſhed to quiet men in the poſſeſſion of their rights, and to put a ſtop to the perpetual diſputes, which elections formerly uſed to occaſion in Scotland. That this end could not be anſwered, if it were conſidered as not extending to the Houſe of Commons. That, by the ſame ſtatute (3), all *complaints* of the election of annual magiſtates in Scotland are limited to two months; and that although there is no *expreſs* limitation as to common law actions of reduction in ſuch caſes, yet the Houſe of Lords, in a very late inſtance, had determined that the limitation did extend to them, upon the ground that the meaning of the legiſlature was to draw a line, beyond which litigation ſhould not be carried, in any mode or form (4). That the Houſe of Commons had recognized the neceſſity of ſuch limitations by adhering ſo ſtrictly to thoſe which it has eſtabliſhed itſelf, that, at the beginning of this ſeſſion, a petition complaining of an undue election having been delivered to the clerk of the Houſe, on the evening of the laſt day of the fortnight allowed for that purpoſe, but *after the Houſe was up*, they would not allow it to be preſented the next day; although there were very particular circumſtances attending the caſe, which, if it had ever been proper to break through the rule, would have juſtified it on that occaſion (5).

On the part of the petitioner, it was contended,

That the juriſdiction of the Houſe of Commons could not be taken away by the act of George the Second, it being an eſtabliſhed maxim of law, that a new juriſdiction given to any court, cannot, by implication, take away the juriſdiction, which a ſuperior court poſſeſſed before in the ſame caſes; That the petition to the Houſe of Commons had been preſented within the time limited by the ſtatute, if that limitation ſhould be thought to extend to their concurrent juriſdiction; And that, if the petition was preſented in time, it ſurely could not be neceſſary, that a complaint ſhould alſo be lodged with the court of ſeſſion, in order to enable the committee to proceed in the cauſe.

That

(3) §. 24.
(4) Caſe of Young and others againſt Johnſon and others.
(5) Vide ſupra, vol. i. Introduct. Note (O) p. 42.

That, on the contrary, it ſeemed more conſiſtent with the privileges of the Houſe, to apply directly to them, when ſitting, and more agreeable to the ſpirit of the act of 1681; for that, according to that act, no complaint could be made to the court of ſeſſion except in the receſs of Parliament.

The Committee, after deliberation among themſelves, informed the counſel, that they were of opinion,

That they were bound by the ſtatute of the 16th of George the Second; that the inrollment of the ſitting member, under all the circumſtances of the caſe, was a ſufficient anſwer to the petitioner's demand of his qualification; and that no other evidence ſhould be called on the head of his qualification (E).

The Committee having decided this point, the petitioner informed them, that he would not give them any farther trouble; and, on Friday, the 17th of April, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the ſitting member was duly elected (6).

(6) Votes, p. 504.

NOTES

NOTES

ON THE CASE OF

CLACKMANNAN.

PAGE 169 (A) Before the ſtanding orders of 1717, there was a reſolution of the Houſe of 23 March, 1714-15, nearly to the ſame purpoſe with the fourth of thoſe orders; and in the caſe of Honiton, 3 May, 1715, the petitioner not having given in his qualification after a requiſition of the ſitting member, the Committee of elections was diſcharged from proceeding on his petition. Journ. vol. xviii. p. 71. col. 1, 2.

P. 171 (B). A *ſuperiority* is the bare ſeignory of land, independent of the uſufructuary intereſt, or beneficial property in that land. A ſuperior, who has not the beneficial property, is the meſne lord, between the King and the terretenant, or actual proprietor. The rent-ſervice, or quit-rent, accruing to the ſuperior, is a mere trifle, and is, I believe, ſeldom required of the landholder. As a ſuperiority of a forty-ſhilling land, or of land of four hundred pounds valued rent, without any ſubſtantial property in ſuch land, entitles a man to vote, a perſon who has a large eſtate, by dividing it into ſuperiorities of that ſort, and granting them for life among his friends, may make as many votes as the number of forty-ſhilling lands, or the amount of the valued rent of the whole, will bear; and this practice has become ſo common in Scotland, that, in moſt counties, two or three proprietors, (generally Peers), are, in effect, the electors of the repreſentative in the Houſe of Commons. A plan for altering this part of the law of Scotland is now in agitation.

P. 171. (C.) The *old extent* is a valuation of the lands in Scotland, ſuppoſed to have been made in the reign of Alexander the Third, in order to aſcertain the proportion the different proprietors were to pay, of a ſubſidy raiſed for his daughter's portion, on her marriage with the King of Norway. When a man can ſhew that his lands were computed at forty ſhillings in this old valuation, he is intitled to be put on the roll, whether they amount to four hundred pounds valued rent,

or

or not. But as, by the ſtatute of the 16th of George the Second, cap. 11. §. 8. no other evidence of old extent can be admitted, but a retour of the land prior to the 16th of September, 1681, the moſt general and eaſieſt method of making out a qualification is by what is called the valued rent.—A retour is a verdict of a ſort of jury, who are appointed to enquire into an heir's title to ſucceed to the eſtate of his anceſtor.

Ibid. (D). The *valued rent* is a valuation of the lands in the different counties in Scotland, made in the time of the Commonwealth, and adopted after the Reſtoration. See the nature of this, and of the old extent, explained at large in Mr. Wight's book on the law of Scotch elections, from page 149 to page 193. By the 16th of George the Second, cap. 11. §. 19. two hundred pounds of valued rent is a ſufficient qualification in the ſhire of Sutherland.

P. 174. (E). The counſel for the reſpective parties in this cauſe ſeemed ſo little aware of the ground which their opponents meant to take, and this produced ſuch a want of preciſion in the arguments, that it is not ſurpriſing that the opinion of the Committee, conſidered as a *legal* deciſion, ſhould not have given entire ſatisfaction even to many perſons unconnected with the parties, which certainly was the caſe. When the Committee firſt withdrew, (for they ſat in the court of Chancery, and retired to deliberate into the inner chamber belonging to that court), the counſel for the petitioner thought they were only gone to decide, whether the ſitting member ſhould be obliged to produce the particular of his qualification, or they ſhould be put to ſhew that the circumſtances of his eſtate had undergone an alteration ſince his firſt enrollment. Finding that the Committee had reſolved, that no evidence on that ſubject ſhould be gone into, they conſidered this as a ſurprize upon them; and a ſort of converſation enſued, about the effect of the limitation in the ſtatute, which they had ſcarcely ſpoken to before. On this, the Committee withdrew again; but on their return, declared that they adhered to their former opinion.

When, in that opinion, they ſaid, that they thought themſelves bound by the ſtatute of George the Second, they could not mean, that ſince that ſtatute, the Houſe of Commons can in no caſe enquire into a perſon's right to be on the freeholder's roll. The principle cannot be controverted, that an affirmative ſtatute, giving a juriſdiction in certain caſes to a court which had it not before, does not take away the old juriſdiction of another court in thoſe caſes.

Neither could the Committee mean, that they were ſo bound by the ſtatute, that they could not entertain a complaint of a perſon's being on the roll, unleſs ſuch complaint were made to the Houſe (by petition) within four months. That

propoſition

propoſition did not apply to the caſe before them, as the petition had been preſented within leſs than two months of the meeting for the election; and while the order for preſenting petitions within a fortnight after the date of the order, or of the delivering of the return to the clerk of the crown, is continued at the beginning of every ſeſſion (1), the complaint to the Houſe, if made at all, muſt, *ex neceſſitate*, be made before the four months expire.

The Committee, therefore meant, that they could not enquire into the right of a perſon to be on the roll, although a complaint were made to the Houſe within the four months, unleſs a complaint were alſo made to the court of ſeſſion within that time. But ſurely, as the juriſdiction of the Houſe is concurrent with, not appellant from, that of the court of ſeſſion, there can be no neceſſary dependency or connection between a complaint to the one, and to the other. Obſerve the conſequence of ſuch a doctrine. We will ſuppoſe the Parliament to meet for the diſpatch of buſineſs, (when the common order for preſenting petitions within a fortnight, is always made) a month after the election. If the day for hearing a petition, the ground of which is a complaint of a perſon's ſtanding improperly on the freeholder's roll, happen to be fixed at any time within four months of the election, (ſuppoſe within ſix weeks), you will, in ſuch caſe, be precluded from proceeding on your petition, unleſs you make your complaint to the court of ſeſſion in leſs than ſix weeks, although the ſtatute poſitively gives you four months time for that purpoſe.

☞ The fourth ſection of the ſtatute of George the Second, on which this cauſe was decided, is very inaccurately penned (2).

1. It makes no direct proviſion for a caſe like the preſent, where the objection has been *firſt made at the meeting of freeholders, and over-ruled by them*, with regard to an application to the court of ſeſſion; and accordingly it has been made a queſtion, whether a complaint to the court of ſeſſion be competent in ſuch caſe. But it has been determined that it is, 11 Feb. 1768; Sir John Gordon againſt William Pulteney, Eſq. and in the caſe of Sir George Suttie. Wight, p. 122.

2. There are no expreſs words giving leave to complain at all to the *court of Seſſion*, (after a man has once been admitted on the roll, and has ſtood there for the neceſſary time not objected to, or objected to, without ſucceſs), upon an objection taken

(1) *Vide* vol. i. p. 22.
(2) *Vide ſupra*, p. 172.

ken on account of a subsequent change of circumstances. The meaning of the legislature certainly was, that such complaint should, in that case, be competent; and that it should only be so within four months after the first Michaelmas or election-meeting subsequent to the alteration of circumstances; and so it seems to have been understood by the court of session. *Vide* Wight, p. 268.

XXII. THE

XXII.

THE

CASE

Of the COUNTY of

LANERK,

In SCOTLAND.

The Committee was choſen on Friday, the 7th of April, and conſiſted of the following Gentlemen.

Lord John Cavendiſh, Chairman,	Members for	York.
Thomas Frankland, Eſq.		Thirſk.
Sir Roger Moſtyn, Bart.		Flintſhire.
Charles Penruddocke, Eſq.		Wiltſhire.
Edward Southwell, Eſq.		Glouceſterſh.
Sir Thomas Clavering, Bart.		Durham county.
Marquis of Granby,		Cambridge Un.
John Orde, Eſq.		Midhurſt.
Lord Mountſtuart,		Boſſiney.
John Scudamore, Eſq.		Hereford.
John Mayor, Eſq.		Abingdon.
Sir Simeon Stuart, Bart.		Hampſhire.
Viſcount Liſburne,		Cardiganſhire.
NOMINEES,		
Of the Petitioner,		
Lord Advocate of Scotland,		Peeblesſhire.
Of the Sitting Member,		
Sollicitor General of Scotland,		Edinburghſh.

PETITIONER.

Daniel Campbell, Eſq.

Sitting Member.

Andrew Stuart, Eſq.

COUNSEL

For the Petitioner.

Mr. Macdonald, Mr. Elliott.

For the Sitting Member.

Mr. Maddocke, Mr. Hardinge.

THE

CASE

Of the COUNTY of

LANERK.

ON Saturday, the 8th of April, the Committee being met, the petition was read, the allegations of which were;

That Mr. Stuart, at the time of the election was ineligible; and

That the petitioner had the majority of legal votes, and was duly elected (1).

The counsel for the petitioner opened the cause by stating that Mr. Stuart, at the time of the election, held the office of joint King's remembrancer in the court of Exchequer in Scotland, which they said was an office of profit under the Crown, created or erected since the 25th of October, 1705, and, therefore, disqualified the holder of it from being elected a member of the House of Commons, in consequence of the provisions of the statute of the 6th of Queen Anne, cap. 7. sect. 25 (2)

The counsel for Mr. Stuart denied that the office of King's remembrancer was within the meaning of that statute, but, at the same time, alledged, that Mr. Stuart did not hold the office at the time of his election.

Upon this, on the part of the petitioner, a copy (which was admitted to be authentic) of the King's commission, under

(1) Votes, 7 Dec. 1774. p. 42.

(2) See the Case of North Berwick, &c. *infra*, for the words of the statute.

under the union ſeal, bearing date the 25th of January, 1771, and granting to Mr. Stuart, and Patrick Warrender, Eſq. and to the ſurvivor, the joint office of King's Remembrancer, for life, was produced; and this being *prima facie* evidence that Mr. Stuart was poſſeſſed of the office, his counſel were put upon proving, that ſince the date of the commiſſion, and before the election, he had diveſted himſelf of it. To ſhow this (1), they called Mr. Cooper, ſecretary to the treaſury, Mr. Sollicitor General, and Mr. Henry Drummond, banker.

Mr. Cooper ſaid, That, on the 25th of October, 1774, or the day before, the Solicitor General told him, he had received from Mr. Stuart, a paper, importing, to be a reſignation of his office, and that he had deſired him to deliver it to him (Mr. Cooper), to Mr. Robinſon the other ſecretary, or to the firſt Lord of the treaſury. That he received this paper on the 25th of October, either incloſed in a blank cover, or with a mere letter of tranſmiſſion, he did not recollect which, That, when he received it, he endorſed it thus. "Received October 25th, G. C." That, on the ſame day, or the day following, he informed Lord North of it, who deſired him to keep it; and that it had been in his cuſtody ever ſince. That it had never been laid before the board; and that he did not know that the King had ever been informed of it. That it came directed to him at the Treaſury-chambers.

That in January, or February, application was made, on the part of Mr. Stuart, for a new commiſſion to be made out to ſomebody elſe; that he, at that time, had received orders to have ſuch a commiſſion made out, and that the only reaſon for its not being done was, that nobody could be found to accept of it (— a great part of the profits being paid to the gentleman who formerly held the office); and becauſe the other joint-remembrancer's conſent had not been obtained. That he (Mr. Cooper) has been ten years in his preſent employment. That the official courſe is to preſent reſignations to the firſt Lord, and receive his commands concerning them. That in his time, however, he did not recollect any reſignation of this ſort, but one of Mr. Owen, which

(1) It was agreed by the counſel and the Committee, that the queſtion whether Mr. Stuart was, or was not poſſeſſed of the office at the time of the election, ſhould be enquired into, and determined, ſeparately. *Vide* vol. 1. p. 31.

which was kept in the ſame manner this had been That he did not remember any reſignations, which, after they had been delivered to him, had failed of taking effect.

The deed of reſignation being produced, and read, it appeared to be an inſtrument, importing Mr. Stuart's deſire to reſign the office, or all his ſhare and intereſt in it, and that he accordingly thereby reſigned it, into the hands of the King, or of the officers, or commiſſioners, empowered to receive the ſame. It was ſigned and ſealed by Mr. Stuart, in the preſence of two ſubſcribing witneſſes; and bears date at Edinburgh, the 18th of October.

The election was holden on the 28th of October.

Mr. Sollicitor General ſaid, That he had received the inſtrument of reſignation from Mr. Drummond, by a ſervant, on the 22d of October, with a letter from Mr. Stuart, deſiring him to deliver it to Mr. Cooper, Mr. Robinſon, or Lord North. That it went from him to Mr. Cooper, on the Tueſday following, but he did not recollect whether he delivered it to him, himſelf, or ſent it. Being aſked if Mr. Stuart's letter contained any farther directions than what he had juſt mentioned, he ſaid, That he underſtood it to be Mr. Stuart's deſire that he ſhould deliver the reſignation, in order to put an end to the objection to his eligibility. That, however, in the opinion he had of the objection, he ſhould have exerciſed his diſcretion on the ſubject of Mr. Stuart's directions; but that, knowing it to be a loſing office in the hands of Mr. Stuart, he had adviſed him to get rid of it, three months before; and that he had delivered it to Mr. Cooper as a *bona fide* reſignation.

Mr. Drummond produced the letters, which paſſed between him and the Solicitor General, relating to the deed of reſignation. They contained nothing more than what had already appeared. He ſaid, That, by Mr. Stuart's letter to him, he was deſired, if the Solicitor General ſhould happen not to be in, or near, London, to deliver the reſignation himſelf to Lord North, or to one of the ſecretaries of the treaſury. That he had deſtroyed Mr. Stuart's letter which accompanied the reſignation, and that he did not recollect whether he was directed by it to deſire Mr. Cooper, Mr. Robinſon, or Lord North, to preſent the reſignation to the board.

The counſel for the ſitting member then called Mr. Davidſon and Mr. Dagge, ſolicitors, to give an account of what

what paſſed in the Houſe, in the caſe of Mr. Maitland, 6 Feb. 1748-9.

The following is what appears in the Journals relating to that caſe.

6 December, 1748. "A petition of David Scot, Eſquire, was preſented to the Houſe, and read; ſetting "forth; That at the election of a burgeſs to ſerve in Parliament for the burghs of Aberbrothock, Aberdeen, Inverbervie, Montroſe, and Brichen, upon the 13th day "of June, 1748, the petitioner, and Charles Maitland "Advocate, then and long after ſheriff depute of the ſhire "of Edinburgh, appeared as candidates: That by an act "made in the 21ſt year of his preſent Majeſty (1), (intituled, &c.) it is, among other things, enacted, "That "no ſheriff depute, in any ſhire in Scotland, ſhall be capable of being elected, or of ſitting or voting as a member of the Houſe of Commons." "That notwithſtanding the ſaid Charles Maitland, as a commiſſioner for the "burgh of Inverbervie, did give his vote, at the ſaid election, for himſelf, to be member for the ſaid diſtrict of "burghs, and did induce two other commiſſioners alſo to "give their votes for him, and did obtain a return from "the ſheriff of Forfar of himſelf, as the burgeſs elected "for the ſaid diſtrict: that the commiſſioners for the burgh "of Aberbrothock, the preſiding burgh [and] Brichen, "gave their votes for the petitioner. Wherefore the petitioner apprehends, that he was duly elected, and ought "to have been returned, as the ſaid Charles Maitland was "by law incapable of being elected, as his incapacity was "then objected, and was notorious to all the electors, and, "in particular, well known to the ſaid Charles Maitland "himſelf: Praying therefore, &c. (2)" The cauſe was appointed to be heard at the bar of the Houſe.

2 February, 1748-9, "the ſtanding order of 1735-6 "being read; and an extract of the minutes of the election "produced; and an extract of the proceedings of the "ſheriff's court of Edinburgh touching the admiſſion of "Maitland, as ſheriff depute, and of Mr. James Levingſton "(the ſheriff ſubſtitute); and a copy of the proteſts taken "by Mr. Charles Maitland on his demiſſion of the office "of

(1) 21 Geo. II. cap. 19.
(2) Journ. vol. xxv. p. 667. col. 1, 2.

" of ſheriff depute of Mid Lothian; and the counſel for " the petitioner having gone through their evidence; the " counſel for the ſitting member was heard, and then the " farther hearing was adjourned to the 6th (1)."

On the 6th of February Mr. Scot withdrew his petition (2).

Mr. Davidſon ſaid, That, at that time, he was clerk to Mr. Roſs, agent for Scot. That he attended the whole courſe of the buſineſs. That Mr. Maitland had executed a *demiſſion* (which is a term of the Scotch law equivalent to " *reſignation*") 10 days before the election, and tranſmitted it by poſt to the Duke of Newcaſtle; but it had not been accepted (3). That the argument of Mr. Joddrel, counſel for Mr. Maitland, was entirely grounded on the injuſtice of conſidering a man as diſqualified, who, before the election, had done all in his power to diveſt himſelf of an incapacitating office. That it was underſtood that this argument turned the opinion of the Houſe, which, before that, had been in favour of Scot; and that he (Scot) withdrew his petition on that account: that he never heard there had been any compromiſe between Maitland and Scot.

Mr. Dagge ſaid, That he was clerk to Philip Carteret Webb, agent for Maitland, but that he knew nothing of the cauſe, but what he had found on the brief for Maitland. This brief was offered to be given in evidence, but, being objected to, was not admitted. It was alſo ſaid, on the part of the petitioner, that Mr. Davidſon's account of Joddrel's argument, and of the conjectures about the opinion of the Houſe, was not evidence, and ought not to have been heard.

It was *ſuggeſted*, by the counſel for Mr. Stuart, that Mr. Campbell had prevented a new commiſſion from iſſuing by writing a letter to Sir Patrick Warrender, deſiring him to oppoſe it. But his counſel aſſerting that he had only written to him, to enquire whether his conſent had been given, there was no evidence produced on that ſubject.

On the part of Mr. Campbell, Mr. Royer, a clerk of the treaſury, and Mr. Walker, an attorney in the remembrancer's office in Scotland, were called.

Mr. Royer ſaid, That, by his office, he had the cuſtody of the laſt quarterly eſtabliſhment of the court of Exchequer in

(1) Journ. vol. xxv. p. 710. col. 1.
(2) Same vol. p. 713. col. 2.
(3) *Quære.*

in Scotland, *i. e.* the ſtate of the quarter's ſalaries of the different officers belonging to the court. He then produced the book, and read, from an entry of that eſtabliſhment, the following words: "5 Jan. 1775. To Andrew "Stuart, Eſquire, 62l. 10s. To Sir Patrick Warrender "62l. 10s." He ſaid, That ſuch an eſtabliſhment is tranſmitted four times a year, by the Barons of the Exchequer in Scotland, to an officer of the treaſury in London, in order to receive the approbation of three Lords of the treaſury, which they ſignify in theſe words; "We do hereby "ſign our approbation, and return it to you, that you may "direct payment." That the laſt eſtabliſhment, of 5 January, was approved of in this form, and ſigned "Charles "Townſhend, Beauchamp, Charles Wolfran Cornwall," and was tranſmitted to Scotland. He then read the laſt entry of an allowance of the ſalary to Mr. Stuart, as ſole remembrancer, which bore date the 5th of January, 1771. (If Mr. Stuart before Mr. Warrender, now Sir Patrick, was joined with him, held the office ſolely, and reſigned previous to the making out of their joint commiſſion.) He ſaid he knew nothing concerning Mr. Stuart's former commiſſion, the circumſtances of the reſignation of it, or of the acceptance of that reſignation. That they were not in his department, but that a warrant for making out a new commiſſion muſt come to him, and that ſuch warrant is ſigned by the King's ſign manual, and counterſigned by three Lords of the treaſury.

Mr. Walker ſaid, That proceſs has iſſued from the remembrancer's office in the names of Stuart and Warrender, without variation, ſince their joint appointment; and did ſo in the laſt term, which was in February, 1775. That, when a new remembrancer is appointed, there is an order of the court to the clerks, to uſe his name, as ſoon as his commiſſion takes effect. That, in 1768, ſuch an order was made for uſing the name of Sir Hugh Dalrymple, then appointed to the office, and a ſimilar order when the ſitting member was appointed to the office ſolely, and another when he and Warrender were jointly appointed. That the office is executed by a deputy. That he did not know by whom the deputy is appointed.

The counſel for the petitioners then read part of the recital of the joint commiſſion to Stuart and Warrender, viz.

"*Et*

" *Et quandoquidem noſtram permiſſionem ſupplicavit, dictum* " *officium reſignare, nobis gratioſe placuit aſſentire cu* , *&* con- " *cedere idem, modo poſtea mentionat. Igitur regia noſtra vo-* " *luntas & bene placitum eſt, literas patentes revocare, per* " *quas dictus Andreas Stuart conſtitutus fuit ad dictum offici-* " *um ; & dare & concedere, &c.*'

COUNSEL for the ſitting Member.

Eligibility, of common right, is to be favoured, and all diſabilities operating on antecedent rights to be conſtrued ſtrictly. The party therefore who is to be diſabled by any diſqualifying ſtatute, muſt come, to a degree of accuracy, within the deſcription of the ſtatute. Evidence that the inſtrument of reſignation was lodged with Mr. Cooper does not, indeed, prove that it was accepted, for to eſtabliſh that, it muſt be traced perſonally to the King. But Mr. Stuart did what was in his power, to remove the ſuppoſed incapacity. If he had been entirely wrong in the mode of communicating his reſignation, or if accidental delay had retarded its arrival, even that ought not to fruſtrate his *bona fide* intention to get free of the office. If the miniſter by delaying, or abſolutely refuſing, to accept a reſignation, could continue a diſability, it would be in his power to preclude all men who once have been poſſeſſed of diſqualifying offices, from ever being choſen members of Parliament; and, as it appeared in a late inſtance (1), that he can, by a ſort of *ne exeat*, prevent a man from getting out, once he is a member of the Houſe, he would alſo be able, by a ſort of *ne intret*, to prevent one in Mr. Stuart's ſituation from getting into it.

To render the reſignation of a perſon holding the ſhare of a joint office valid, the aſſent of the other perſon who is joined in the office is not neceſſary. What may be the effect as to the ſhare not reſigned, is no part of the preſent queſtion.

A Committee, when they enquire into a point of fact, is, in every reſpect, to be conſidered as a jury, and (as a jury)

(1) This refers to Mr. Bayly's having been refuſed the ſtewardſhip of the Chiltern Hundreds, which he aſked for, in order to vacate his ſeat for Weſtbury, when the election for Abingdon was determined to be void. *Supra*, vol. i. laſt p. caſe of Abingdon.

jury) may decide ſuch a point on circumſtances which come within the knowledge of any of themſelves, although not proved by the evidence given before them. One of the gentlemen on the preſent Committee is conceived to be well acquainted with the hiſtory of what paſſed in the caſe of Scot and Maitland, and, if ſo, he knows (whether Mr. Davidſon's account be legal evidence or not) the circumſtances to have been as Mr. Davidſon has ſtated them, and, therefore, although there was no actual reſolution, the Committee will conſider the event of that cauſe as tantamount to a determination, in favour of Mr. Maitland, on the ſame ground on which the ſitting member's eligibility ſtands in the preſent caſe.

COUNSEL for the petitioner.

With regard to all offices of truſt, whether on a great or ſmall ſcale, it is a clear principle of law, that there muſt be a proper underſtanding between the *employer* and *employed*, before the relation can be diſſolved. This was not the caſe with Mr. Stuart's reſignation, at the time of the election. The relation between him, and the King was not underſtood to be at an end, either by the Treaſury here, or the court of Exchequer in Scotland. Long after the election, the latter ſtated him to be joint-remembrancer, in the eſtabliſhment tranſmitted to England; and proceſs continued to iſſue in his name, and the Lords of the Treaſury made out their warrant for him to receive a quarter's ſalary, which has either been paid, or is certainly payable to his order.

Another principle of law is, that all ſurrenders, or reſignations, of grants of offices under the Crown, muſt be made with the ſame ſolemnity with which the grants were made. The holder of ſuch an office cannot completely diveſt himſelf of it, except the reſignation be made into the hands of thoſe who by law are to receive it, when acting in their official capacity, and not until the King ſignify, by matter of record, his acceptance of it. This is proved by a great variety of caſes in the law books. Brooke's Abr. Title *Surrender*, *Placit.* 18. 9 Edw. IV. 7. Dyer 176, 194. b. 355. Br. Abr. fol. 205. Jenkins 123. *Placit* 50. Plowden 105. Bacon's Abr. Title *Office and Officers*, p. 743.

Thoſe, indeed, are caſes which happened in England; but they will be found to apply to the preſent caſe, when it

it is conſidered that Mr. Stuart's office belongs to a court, conſtituted according to the model of the court of Exchequer in this country, and governed, in its proceedings, by the law of England.

But, independent of thoſe authorities, the tenor of Mr. Stuart's own commiſſion, and of all the previous commiſſions to this office (☞ ſome of which were given in evidence), ſhews, that the office is not diveſted out of the former holder, upon a reſignation, until the new commiſſion is granted. If the commiſſion to Mr. Stuart is attended to (1), it will appear that it conſiſts of two parts; the firſt, a formal acceptance, by the King, of the reſignation of the ſole office which he formerly held, and a conſequent revocation of the letters patent; and the other, the new grant of the office. On the preſent occaſion, no ſuch acceptance or revocation can be ſhown.

If, indeed, it ſhould appear, in any caſe, that the officer wiſhing to reſign an incapacitating office, had done all in his power for that purpoſe, and that the Crown had, in order to continue his incapacity, refuſed to complete his act, the Houſe of Commons might, perhaps, on general principles, think themſelves entitled to fruſtrate an abuſe of the *power* of the Crown exerciſed in one way, and ſheltered under an act of Parliament, whoſe object was to reſtrain its *influence* exerciſed in another way. Even this would be going a great way, for it is a *voluntary* act where a perſon diſqualifies himſelf by accepting of an incapacitating office, and as he accepts of it with his eyes open as to the conſequences, he conſents to the diſability, until he can, in the regular way, diveſt himſelf again of the office. The words of the ſtatute of Queen Anne are poſitive. "No "perſon who ſhall *have* any new office, &c. ſhall be capa- "ble of being elected (2);" and, till a man has, in a legal manner, got rid of an office, to which a truſt and duties are annexed, he certainly is anſwerable for the performance of the truſt and duties, and, in every legal ſenſe, *has* the office.

But in the preſent caſe, there is no pretence of any injurious refuſal by the Crown. It appears that Mr. Stuart gave no directions for preſenting his reſignation to the perſons who by law were to receive it. A Secretary of the

(1) *Supra*, p. 186.
(2) 6 Ann. cap. 7. § 25.

the treaſury, or the Firſt Lord, in his private capacity, although they might be the proper channels for conveying it to the board, were, neither of them, the proper officers to receive it. While it continued in their hands, unaccepted, it was the ſame thing as if it had ſtill remained with Mr. Stuart himſelf; and he does not appear to have ſhown the ſmalleſt impatience, or deſire, to haſten the acceptance, or the revocation of his commiſſion.

If the caſe of Scot and Maitland were exactly parallel to the preſent, the ſitting member could derive no advantage from it, becauſe there was no determination. The counſel on the other ſide do not pretend to ſay that the Committee ought to pay attention to the *recollection* of an agent, at the diſtance of twenty years, of what people out of doors *imagined* the Houſe *thought* in conſequence of a ſpeech from a gentleman at the bar; and no gentleman on the Committee, who may have been a member of the Houſe at that time, will take upon him to ſay, what were the ſentiments of the majority of the Houſe, on a queſtion which never came to a deciſion.

The Committee, after having withdrawn (1), and deliberated about two hours, directed their Chairman to inform the Counſel, that they had come to the following reſolution:

Reſolved, "That it is the opinion of the Committee, that Andrew Stuart, Eſq. by the inſtrument of reſignation executed at Edinburgh, on the 18th of October, 1774, and delivered to Mr. Cooper on the 25th of the ſame month, was, at the time of his election, diveſted of the office of King's remembrancer in the court of Exchequer in Scotland."

This reſolution, of courſe, put an end to the cauſe.

On Monday, the 10th of April, the Committee, by their Chairman, informed the Houſe, that they had determined,

That the ſitting member was duly elected (2).

XXIII. THE

(1) They ſat in the Court of Chancery.
(2) Votes, p. 516.

XXIII.

THE

CASE

Of the BOROUGH of

St. IVES,

IN THE COUNTY OF CORNWALL.

The Committee was choſen on Friday, the 28th of April, and conſiſted of the following Gentlemen.

Henry Herbert, Eſq. Chairman,	Members for	Wilton.
Sir William Guiſe, Bart.		Glouceſterſhire.
Philip Yorke, Eſq.		Helleſton.
George Finch Hatton, Eſq.		Rocheſter.
Hon. Nathaniel Curzon,		Derbyſhire.
Staats Long Morris, Eſq.		Banff, &c.
John Adams, Eſq.		Carmarthen.
Sir Henry Gough, Bart.		Bramber.
Sir William Wake, Bart.		Bedford.
Joſeph Martin, Eſq.		Tewkſbury.
Marquis of Granby,		Cambr. Univer.
Joſhua Mauger, Eſq.		Poole.
Sir Philip Jennings Clerke, Bart.		Totneſs.
NOMINEES,		
Lord John Cavendiſh,		York.
Abel Moyſey, Eſq.		Bath.

PETITIONER.

Samuel Stephens, Eſquire.

Several Inhabitants, Electors of the Borough of St. Ives.

Sitting Members.

William Praed, Eſq. Adam Drummond, Eſq.

COUNSEL

For the Petitioners.

Mr. Mansfield, Mr. Buller.

For Mr. Praed,

Mr. Lee, Mr. Elliot.

For Mr. Drummond,

Mr. Macdonald.

THE

CASE

Of the BOROUGH of

ST. IVES.

ON Saturday, the 29th of April, the Committee being met, the two petitions were read, ſetting forth; That at the laſt election, when the two ſitting members, and Arthur Holdſworth, Eſq. and Mr. Stephens, the petitioners, were candidates, the two ſitting members, and Mr. Praed's father, by themſelves and their agents, previous to, and during, the election, did give and lend ſeveral large ſums of money to ſeveral of the electors, in order to corrupt and to procure them to vote for them (the two ſitting members); That they by other ways and means were guilty of bribery; That the returning officer had acted partially, by admitting perſons to vote who had no right, and rejecting others who had a right; and that, by theſe, and other undue means, the ſitting members had obtained a majority on the poll, and were returned (1).

The laſt determination of the right of election in this borough was then read, and is as follows:

8 December, 1702. Reſolved, "That the right of elec-"tion of burgeſſes to ſerve in Parliament for the borough "of Saint Ives, in the county of Cornwall, is in the inha-"bitants of the ſaid borough, paying ſcot and lot (2)."

Then the ſtanding order of 1735-6 was read (3).

The

(1) Votes, 7 Dec. 1774. p. 43, 44.
(2) Journ. vol. xiv. p. 74. col. 2.
(3) *Supra*, vol. i. p. 51.

The numbers on the poll, as produced by the town clerk, were as follow:

For Praed	95
For Drummond	78
For Stephens	71

The evidence produced on the part of the petitioner tended to ſhow that certain ſums of money, which were proved to have been advanced by Mr. Praed, the father, to the voters, for which he took their notes, payable with intereſt, to the bank of Truro, were only colourable loans; that, when the voters received the money, there was a condition annexed that they ſhould vote for his ſon and a *friend*; that they were given to underſtand that if they complied wiih this condition, the money would never be demanded of them; and that Mr. Praed, the father, was to be conſidered as the agent for his ſon, and for Mr. Drummond, having, by canvaſſing with Mr. Drummond, ſhown that *he* was the friend meant. That Mr. Praed and Mr. Drummond were, therefore, incapable of ſitting for the borough.

That ſo many of the voters for the ſitting members had been bribed that, when they were ſtruck off the poll, the majority muſt remain with Mr. Stephens, and he be entitled to be declared duly elected.

They likewiſe propoſed to add about 40 to the poll, in favour of Mr. Stephens, by proving, that, though they had not been rated, and had not paid, they poſſeſſed rateable property, and ought to have been rated, and were, therefore, entitled to vote.

The counſel for the ſitting members objected to any evidence being given on this head.

They ſaid they were ready to prove, that all the perſons who had been rated in St. Ives for the laſt five years, were ſo on the laſt occaſion of making the rate, except two, who had been ſtruck off becauſe they had applied, on account of the narrowneſs of their circumſtances, to be relieved from the land and window tax. That none of the perſons in queſtion, except two, had appealed againſt the rate made in Jan. 1774; and that, on *their* appeal, the rate was confirmed. That the determination in the caſe of Milborne Port, (which Mr. Stephens s counſel quoted as in his favour) was, that when a mas has been, *de facto*, rated, and is poſſeſſed of rateable property, and has paid the rate, ſuch perſon is within the deſcription of one paying ſcot and lot, although

though the overſeers, who made the rate, may have been illegally appointed (6). But that it never had been pretended before, that men under circumſtances like thoſe of the perſons now propoſed to be added to the poll, could vote as ſcot and lot men. That the Committee would not transform themſelves into overſeers of the poor, and make a new rate for the borough of St. Ives. That the pariſh officers have, in that reſpect, a diſcretionary power, which even the court of King's bench would not controul, unleſs on the ground of groſs miſconduct and partiality.

The counſel for the petitioners anſwered, that ſome of the perſons in queſtion could be ſhown to have applied to be rated, and had been refuſed, ſo that they did not acquieſce in what the overſeers had done. That they did not appeal, knowing it would be in vain, for that it could alſo be ſhown that the four juſtices who appointed the overſeers, were all in the intereſt of the Praeds. That the ſitting member himſelf was one of the four, and that the appeal which had been brought was only colourable, and made by two of Praed's partizans, for the purpoſe of taking advantage of it on the preſent occaſion.

The Committee aſked if they meant to bring evidence, to prove miſconduct or criminal partiality in the overſeers, with regard ro the leaving any of the perſons in queſtion out of the rate; which they ſaid they did not; on which the Committee declared by their Chairman, that they were of opinion,

That perſons, though poſſeſſed of rateable property, if they have not been rated, and cannot prove miſconduct in the overſeers in not rating them, they are not entitled to vote (A).

The counſel for the ſitting members brought witneſſes to prove that the petitioner had endeavoured to procure himſelf to be elected, by giving or promiſing money to the voters.

☞ I have not attempted to ſtate the evidence produced to eſtabliſh the bribery, for reaſons which have been given in ſeveral of the foregoing parts of this work, and particularly in the caſe of Shafteſbury (B).

(6) Vide the reſolution of the Committee in that caſe, ſupra, vol. i. p. 65.

In the courſe of the evidence, one Wallis was called, to prove that one Noell ſaid, in Mr. Praed the father's preſence, and hearing, that Mr. Praed knew that he (Noell) could not take the bribery oath, and that Praed ſaid nothing to contradict him.

This queſtion was objected to.

It was ſaid, That it is an eſtabliſhed rule, that no evidence ſhall be admitted upon oath, of what a man ſaid when he was not upon oath (4). That to break through this rule might be attended with the worſt of conſequences, for that many men who would not take a falſe oath, might be drawn in to ſay things that are falſe, in converſation, in the preſence of a perſon placed within hearing, in order to be able to relate, afterwards, upon oath, what the other had ſaid.

The counſel for the petitioners admitted the rule, but ſaid it did not apply to the evidence now offered, for that here the witneſs was to prove a declaration of Noell and a charge brought by him againſt Praed in Praed's hearing, and which Praed did not contradict, and therefore ſeemed to admit to be true. That this was evidence of his behaviour upon ſuch a charge being made againſt him, and therefore was certainly admiſſible in every court of juſtice.

The Committee over-ruled the objection.

On Monday, the 8th of May, the Committee, by their Chairman, informed the Houſe, that they had determined,

That Mr. Drummond was duly elected; and that the election, with reſpect to one of the burgeſſes to ſerve in Parliament for the borough of St. Ives, was void.

And, accordingly, a new writ was ordered (5).

(4) Vide ſupra, Caſe of Shafteſbury, p. 150, 151.
(5) Votes, p. 644.

NOTES

NOTES

ON THE CASE OF

SAINT IVES.

PAGE 193, (A) The following caſe is in point on this ſubject.

The KING *v.* the CHURCH-WARDENS of WEOBLY.

" The court refuſed to grant a *mandamus*, directing to inſert particular perſons in the poor's rate, upon affidavits of their ſufficiency, and being left out to prevent their having votes for parliament men; for that the remedy was by appeal, and this court never went farther than to oblige the making the rate, without meddling with the queſtion who is to be put in, or left out, of which the pariſh officers are the proper judges, ſubject to an appeal." Strange, 1259.

Ibid. (B).

OF BRIBERY.

Bribery is one of the moſt important *Titles* in the law of elections. It is to be regretted, therefore, that the nature of the cauſes where queſtions of bribery ariſe, and are litigated by counſel, is ſuch, that it is, for the moſt part, impoſſible to deduce from the determination of the Committee, what their opinion was upon thoſe particular queſtions. It may be uſeful in this place to bring before the reader a ſort of general view of the ſubject.

Wherever a perſon is bound by law to act without any view to his own private emolument, and another, by a corrupt contract, engages ſuch perſon, on condition of the payment or promiſe of money, or other lucrative conſideration, to act in a manner which *he* ſhall preſcribe, both parties are, by ſuch contract, guilty of bribery.

It is clear, that every ſpecies of this offence muſt be conſidered as criminal; and, accordingly, the court of King's Bench, in a caſe which happened a few years ago, held " That bribe-" ry at elections of members of Parliament, muſt always have

" been a crime at common law, and puniſhable by indictment " or information (1)." There are, however, I believe, no traces of any action, or proſecution, for this kind of bribery, in the annals of Weſtminſter-hall, till after the legiſlature thought fit to inflict particular penalties upon it, by the ſtatute of the 2nd of Geo. II. cap. 24. If we look into lord Coke, Hawkins, or the other writers on the Pleas of the Crown, we find that their definitions extend only to the corruption of men in judicial offices.

Perhaps it is not difficult to account for the ſilence of the books of common law, on the ſubject of election bribery. About the time when the increaſe of money, and the growing importance of a ſeat in the Houſe of Commons, firſt gave riſe to the offence, the Houſe began to aſſert their excluſive judicial power in whatever concerned the elections of their own members. Bribery eſſentially affecting the freedom of election, they took cognizance of, and puniſhed, both the electors, and elected, who offended in that reſpect; and when they were once in poſſeſſion of this juriſdiction, and it was underſtood to be a matter of privilege, it would have been a dangerous attempt, in thoſe days, in any proſecutor to carry a complaint on the ſubject to any other tribunal. Lawyers would have been very unwilling to undertake, and the Judges equally unwilling to entertain, ſuch a cauſe in Weſtminſter-hall. They would have probably ſaid, as Mr. Juſtice Powis did, when another matter touching elections was, for the firſt time, brought before a court of common law, " The " determination of this is particularly reſerved to the Parliament: we are not acquainted with the learning of elections, " and there is a particular cunning in it, not known to us (2)."

The firſt inſtance of bribery in the Journals of the Houſe of Commons, is that of Thomas Long, in the reign of Queen Elizabeth, which has been cited in ſo many books, that I ſhould not repeat it here, if it were not for the difficulty I find in reconciling the entry of it in the Journals, with an obſervation which, in the report of the caſe of the King *v.* Pitt, is ſaid to have fallen from the Chief Juſtice of the King's Bench on that occaſion. The counſel againſt the proſecution in that caſe cited lord Coke's account of Long's caſe, in his 4th Inſtitute (3), where he ſays, " That the mayor of Weſtbury was " ned in the Houſe of Commons." Lord Mansfield is made to ſay on this, " The latter part cannot be true. There " could be no fine ſet there.——It muſt have been in the ſtar " chamber."

(1) The King *v.* Pitt, 3 Burr. p. 1338.
(2) 2 Lord Raym. p. 944.
(3) P. 23.

" chamber (1)." Now the words of the entry in the Journals are as follow.

" Foraſmuch as Thomas Longe, gentleman, returned one " of the burgeſſes for the borough of Weſtburye, in the coun- " ty Wilteſhire for this preſe t Parliament, b ing a very ſimple " man, and of ſmall capacity to ſerve in that place, hath this " day in open c urt confeſſed, that he gave unto Anthony " Garlande, mayor of t e ſaid t wn of Weſtbury, and unto " one * Watts of the ſame town, the ſum of four pounds for " that place and room of burgeſsſhip; it is *ordered* by this " Houſe, that the ſaid Anthony Garlande, and the ſaid Watts, " ſhall immediately repay unto the ſaid Thomas Longe the " ſaid ſum of four pounds; and alſo that a fine of twenty " pounds be *by this Houſe* aſſeſſed upon the corporation or " inhabitants of the ſaid town of Weſtbury, to the Queen's " majeſty's uſe, for their ſaid lewd and ſlanderous attempt; " and that the ſaid Thomas Longe, his executors and admi- " niſtrators, ſhall be diſcharged againſt the ſaid Anthony Gar- " land and * Watts, their heirs, executors and adminiſtrators, " of and for all bonds made, by the ſaid Thomas Longe, to " any perſon or perſons, touching the diſcharge of the exerciſe " of the ſaid room or place of burgeſsſhip, in any wiſe (2)."

It appears, therefore, that the Houſe, *de facto*, did ſet a fine in this caſe, as they did in the caſe of Arthur Halle, which lord Coke quotes in the ſame place. If the words aſcribed to lord Mansfield really fell from him, we muſt ſuppoſe that he meant that, *de jure*, the Houſe could not impoſe a fine, and that, in ſuch caſes, the ſtar chamber was the court whoſe province it was, in thoſe days, to inflict that puniſhment.

It is eſſential to the very idea of *election*, that it ſhould be *free*, and this has been declared by the legiſlature in the ſtatute of Weſtminſter 1. (3), with regard to elections in general, and by the Declarations of rights (4), with regard to elections of members of Parliament. Hence it is underſtood that, independent of the poſitive ſtatutes againſt bribery, whenever a perſon is returned in conſequence of an undue influence acquired by that means, his election is void; and that every vote purchaſed by bribery is alſo void, the perſon who gave his voice under ſuch influence, being to be conſidered as if he had not voted at all. There are determinations of the Houſe to this effect, previous to the ſtatutes. Lord Coke tells us, that Long was removed; and I think we may infer that he was, from the entry in the Journals, though it is not poſitively mentioned there.

(1) 3 Burr. p. 1336.
(2) Journ. 9 May, 1571. vol. i. p. 88. col. 2.
(3) 3 Edw. 1. cap. 5.
(4) 1 Will. and Mar. 2 ſeſ. cap. 2.

there. In the caſe of Stockbridge, 15 Nov. 1689, the election was avoided on account of bribery. Journ. vol. x. p. 287, col. 1, 2.

Treating, gifts, promiſes, &c. although of the ſame nature with bribery, yet not falling within the popular ſenſe of the word, which is confined to the actual payment of money, were frequently ſubſtituted in place of a direct purchaſe, in the hopes that the offence, in that ſhape, would paſs with impunity. This the Houſe endeavoured to obviate, by the following reſolution of the 2 of April 1677 (1) which was made a ſtanding order, 21 October 1678 (2).

Reſolved, "That, if any perſon, hereafter to be elected into "a place for to ſit and ſerve in the Houſe of Commons, for any "county, town, port, or borough, after the teſte, or the iſ-"ſuing out of the writ or writs of election, upon the calling or "ſummoning of any Parliament hereafter; or, after any ſuch "place becomes vacant hereafter in the time of Parliament, "ſhall by himſelf, or by any other in his behalf, or at his "charge, at any time before the day of his election, give any "perſon or perſons, having vote in any ſuch election, any meat "or drink, exceeding in the true value of ten pounds in the "whole, in any place or places, but in his own dwelling-houſe "or habitation, being the uſual place of his abode for ſix "months laſt paſt; or ſhall, before ſuch election be made and "declared, make any other preſent, gift, or reward, or pro-"miſe, obligation, or engagement to do the ſame, either to "any ſuch perſon or perſons in particular, or to any ſuch county, "city, town, port. or borough in general; or to, or for the "uſe and benefit of them, or any of them; every ſuch enter-"tainment, preſent, gift, reward, promiſe, obligation, or "engagement, is by this Houſe declared to be bribery: and "ſuch entertainment, preſent, gift, reward, promiſe, obliga-"tion, or engagement, being duly proved, is and ſhall be "ſufficient ground, cauſe, and matter, to make every ſuch "election void, as to the perſon ſo offending, and to render "the perſon ſo elected incapable to ſit in Parliament by ſuch "election; and hereof the Committee of elections and privi-"leges is appointed to take eſpecial notice and care; and to "act and determine matters coming before them accordingly."

This order is clearly the model on which the ſtatute of 7 Will. III. cap. 4. commonly called the treating act, was formed, which however varies from it in ſeveral reſpects. It is thereby enacted,

Sect. 1. "That no perſon or perſons hereafter to be elected "to ſerve in Parliament for any county, city, town, borough, "port, or place, within the kingdom of England, dominion of "Wales,

(1) Journ. vol. ix. p. 411. col. 1. (2) *Ibid.* p. 517.

" Wales, or town of Berwick upon Tweed, after the teſte of " the writ of ſummons to Parliament, or after the teſte or the " iſſuing out or ordering of the writ or writs of election upon " the calling or ſummoning of any Parliament hereafter, or " after any ſuch place becomes vacant hereafter in the time of " this preſent, or of any other Parliament, ſhall or do here- " after, by himſelf or themſelves, or by any other ways or " means on his or their behalf, or at his or their charge, be- " fore his or their election to ſerve in Parliament for any county, " city, town, borough, port, or place within, *(as above)* di- " rectly or indirectly give, preſent, or allow to any perſon or " perſons, having voice or vote in ſuch election, any money, " meat, drink, entertainment, or proviſion; or make any pre- " ſent, gift, reward, or entertainment, or ſhall, at any time " hereafter, make any promiſe, agreement, obligation, or en- " gagement, to give or allow any money, meat, drink, provi- " ſion, preſent, reward, or entertainment, to or for any ſuch " perſon or perſons in particular, or to any ſuch county, city, " town, borough, port, or place in general, or to or for the " uſe, advantage, benefit, employment, profit, or preferment " of any ſuch perſon or perſons, place or places, in order to " be elected, or for being elected, to ſerve in Parliament for " ſuch county, city, borough, town, port, or place."

And, Sect. 2. " That every perſon and perſons ſo giving, " preſenting or allowing, making, promiſing or engaging, " doing, acting or proceeding, ſhall be, and are hereby de- " clared and enacted diſabled and incapacitated, upon ſuch " election, to ſerve in Parliament for ſuch county, city, town, " borough, port, or place; and that ſuch perſon or perſons " ſhall be deemed and taken, and are hereby declared and en- " acted to be deemed and taken, no members in Parlia- " ment, and ſhall not act, ſit, or have any vote or place in " Parliament, but ſhall be and are hereby declared and enact- " ed to be to all intents, conſtructions and purpoſes, as if " they had been never returned or elected members for the Par- " liament."

Notwithſtanding this ſtatute, bribery, in all its branches, was carried every day to greater exceſs, and the legiſlature found it neceſſary to make more effectual proviſions to put a check to it, by inflicting ſevere penalties on the offenders, and by making it the intereſt of perſons, privy to the offence, to make ſuch diſcoveries as might bring them to juſtice. This was done by the act of the 2d. of Geo. II. cap. 24. of which the following clauſes deſerve particular attention.

Sect. 1. " Upon every election of any member or mem- " bers to ſerve for the Commons in Parliament, every free- " holder, citizen, freeman, burgeſs, or perſon, having or

" claiming

" claiming to have a right to vote or be polled at ſuch elec-
" tion, ſhall, before he is admitted to poll at the ſame elec-
" tion, take the following oath, (or being one of the people
" called Quakers, ſhall make the ſolemn affirmation appointed
" for Quakers), in caſe the ſame ſhall be demanded by either
" of the candidates, or any two of the electors; That is to
" ſay,

" I, A. B. do ſwear, (or, being one of the people called
" Quakers, I, A. B. do ſolemnly affirm,) I have not received,
" or had by myſelf, or any perſon whatſoever in truſt for me,
" or for my uſe and benefit, directly or indirectly, any ſum
" or ſums of money, office, place or employment, gift or re-
" ward, or any promiſe or ſecurity for any money, office, em-
" ployment or gift, in order to give my vote at this election,
" (and that I have not been before polled at this election).

Sect. 7. " If any perſon who hath, or claimeth to have, or
" hereafter ſhall have, or claim to have any right to vote in
" any ſuch election, ſhall, from and after the ſaid 24th day of
" June which ſhall be in the year of our Lord one thouſand
" ſeven hundred and twenty-nine, aſk, receive or take any
" money or other reward, by way of gift, loan or other de-
" vice, or agree or contract for any money, gift, office, em-
" ployment, or other reward whatſoever, to give his vote,
" or to refuſe or forbear to give his vote in any ſuch election,
" or if any perſon by himſelf, or any perſon employed by
" him, doth or ſhall, by any gift or reward, or by any pro-
" miſe, agreement or ſecurity for any gift or reward, corrupt
" or procure any perſon, or perſons to give his or their vote or
" votes, or to forbear to give his or their vote or votes in any
" ſuch election, ſuch perſon ſo offending in any of ths caſes
" aforeſaid, ſhall, for every ſuch offence, forfeit the ſum of
" five hundred pounds of lawful money of Great Britain, to
" be recovered as before directed; (*i. e.* § 1. by action of debt,
" bill, plaint, or information, in any of his Majeſty's courts
" of record at Weſtminſter; and if the offence ſhall be com-
" mitted in Scotland, by ſummary action or complaint before
" the court of ſeſſion, or by proſecution before the court of
" juſticiary), together with full coſts of ſuit; and every perſon
" ſo offending in any of the caſes aforeſaid, from and after
" judgment obtained againſt him in any ſuch action of debt,
" bill, plaint, or information, or ſummary action or proſecu-
" tion, or being *any otherwiſe lawfully convicted thereof*, ſhall
" for ever be diſabled to vote in any election of any mem-
" ber or members to Parliament, and alſo ſhall for ever be diſ-
" abled to hold, exerciſe, or enjoy any office or franchiſe to
" which he and they then ſhall, or at any time afterwards may
" be

"be entitled, as a member of any city, borough, town cor-
"porate, or cinque port, as if ſuch perſon was naturally
"dead."

By Sect. 8. Any perſon offending againſt the act, who, within twelvemonths after the election, ſhall diſcover another perſon or perſons offending againſt it, ſo as the perſon ſo diſcovered be thereupon convicted, ſuch perſon ſo diſcovering, and not having been before that time convicted of any offence againſt the act, is exempted from the penalties and diſabilities which he would otherwiſe incur.

By Sect. 11. (explained by the 9th of Geo. II. cap. 38.) thoſe penalties and diſabilities are not to take place, unleſs the proſecution be commenced within two years after they ſhall be incurred.

By the 16th of Geo. II. cap. 11. the proviſions of the 2d of Geo. II. cap. 24. are extended to the election of delegates in Scotland (1), with this variance, that a different oath is thereby preſcribed for the magiſtrates and counſellors, who are the electors of the delegates (2).

Upon theſe ſtatutes Mr. Juſtice Blackſtone obſerves, that there is nothing wanting to complete their efficacy, but reſolution and integrity to put them in ſtrict execution (3). Since the new judicature was eſtabliſhed, the public have ſeen that ſuch vigorous execution of this part of the law is no longer wanting, whatever may have been the caſe when the learned Judge's work was firſt publiſhed. There are ſtill however many queſtions which having ariſen on the conſtruction, both of the ſtatutes, and of the common law of Parliament, concerning bribery, and not having been ſettled by direct determinations, ſerve to embarraſs thoſe who, from a ſenſe of its dangerous tendency, are zealous to eradicate this evil as far as is poſſible, by the only means by which it can be done, certain and ſpeedy puniſhment.

The moſt conſiderable of thoſe queſtions are as follow:

1. How far does the incapacity declared by the ſtatute of William extend?

The moſt obvious meaning of the words is, that the perſon who, in order to be elected, has been guilty of any of the different ſpecies of bribery there deſcribed, ſhall be incapable of ſitting by a return made of him to the particular writ after the teſte of which, or after the vacancy which gave occaſion to it, his offence was committed. By this conſtruction, if upon ſuch perſon's being returned, and, in conſequence of the proof of the offence, his election's being declared void, a new writ ſhould iſſue,

(1) 16 Geo. II. cap. 11. § 33.
(2) 16 Geo. II. cap. 11. § 34.
(3) Black. Com. vol. i. p. 179. 4to.

iſſue, and he ſhould ſtand again, and be choſen and returned, without renewing the offence after the teſte of ſuch new writ, he would be entitled to ſit on this new election. The ſtatute, however, has been underſtood otherwiſe; and the words "*ſuch election*" are explained to mean any election made to fill the particular ſeat for which the firſt writ iſſued, which, although a new writ iſſues, the ſaid election is to do, for it cannot be ſaid to have been ſupplied by the firſt, nobody having been thereby entitled to take poſſeſſion of it. The determination in the caſe of Thetford in 1699, or rather 1700, ſeems to carry the incapacity ſtill farther. On the 26th of January, the Houſe had come to the following reſolution.

Reſolved, "That James Sloane, Eſquire, in treating the "Corporation of Thetford, in the county of Norfolk, has been "guilty of a breach of the late act of Parliament for preventing expences in elections."

Then his election was reſolved to be a void election (1); and a new writ iſſuing, Mr. Sloane was re-choſen, and Mr. Soame, the other candidate, petitioned againſt him; in conſequence of which, the following entry appears in the Journals.

2 March, 1699. "The Houſe, (according to order), proceeded to take into conſideration the act made in the 7th year "of his Majeſty's reign, for preventing charge and expence in "elections of members to ſerve in Parliament;—And the petition of Edward Soame, Eſq. was read;—And the ſaid act "was read;—And Mr. Sloane attending, (according to order), he was heard in his place;—And then he withdrew.—"And a debate ariſing in the Houſe, upon the conſtruction of "the ſaid act, upon Mr. Sloane's being again choſen and returned for the borough of Thetford.—And the queſtion being "put, That the ſaid Mr. Sloane be capable of *ſerving in this "preſent Parliament*, for the ſaid borough,—It paſſed in the "negative (2)."

This determination would extend the incapacity to every ſubſequent vacancy which might happen for the ſame place during the courſe of a Parliament. Thus, if a third writ had iſſued, and Mr. Soame, (or any new candidate), had then been elected, and returned, and he had vacated his ſeat a year afterwards, Sloane, according to the deciſion of the Houſe, was then incapable of coming in his room. But, as far as I can underſtand them, the words of the ſtatute do not warrant ſuch a conſtruction; much leſs can they mean that a perſon offending againſt the ſtatute ſhall be for ever afterwards incapable of repreſenting the place where the offence was committed; yet this ſeems

(1) Journ. vol. xiii. p. 145. col. 2.
(2) *Ibid.* p. 251. col. 1.

ſeems to be aſſerted by an author of great authority, when he ſays, "That it is enacted, that no candidate ſhall, &c. (reciting "the prohibition of the act,) *on pain of being incapable to ſerve "for that place in Parliament* (1)."

2. Is a candidate who, before the teſte or iſſuing of the writ, or before the vacancy, has bribed one or more electors, but who has a majority of unbribed votes, and has been returned, capable of ſitting on ſuch return?

This caſe is not within the proviſions of either of the ſtatutes; and as it has never been contended, that a man who has been guilty, or is even convicted, of bribery, thereby incurs a general inability to be elected, it would ſeem, upon principle, that the majority of fair electors having choſen ſuch a perſon, although in a place where ſome have been corrupted by him, their election ought to be as valid as if they had choſen a man who had been a candidate, and had bribed, in another place. But it is ſaid, that the current of determinations is otherwiſe; and in this very caſe of St. Ives, it was underſtood, by the counſel on both ſides, that Mr. Praed muſt have been declared duly elected, if the Committee had not thought that a perſon who has gained any votes by bribery is incapable of ſitting on that election, although he have the voices of a majority of uncorrupted electors.

3. If there are two candidates, and one has been guilty of bribery, but ſtill has a majority of fair unbribed votes, ſhall the other, on the bribery being proved on the firſt, be declared duly elected?

In the caſe of Chippenham, in 1690-2, Sir Baſil Firebraſs, the ſitting member, had 60 votes; Mr. Talmaſh, the petitioner, only 44. Bribery was imputed to the ſitting member. But only 14 of his votes were objected to, and the objections to 7 were given up; ſo that, deducting the other 7, he remained with a conſiderable majority. Yet the Houſe reſolved, 22 Jan. That Sir Baſil Firebraſs, by himſelf, or agents, had been guilty of bribery, and was not duly elected; and *that Mr. Talmaſh was duly elected* (2).

This caſe, however, is not ſufficient to eſtabliſh a doctrine clearly againſt reaſon and juſtice. If it is the law of Parliament, that a candidate who is guilty of bribing a ſingle voter, cannot ſit on that occaſion for the place where he was guilty of the bribery, ſtill, as the fact of his having ſo done is not to be preſumed to have been known to the other fair electors who voted for him, their votes cannot be taken to have been thrown away, which they muſt be, in order to entitle the other candidate to the ſeat. The caſe of Chippenham was cited laſt winter

(1) Blackſt. Com. vol. i. p. 178. 4to.
(2) Journ. vol. x. p. 638. col. 2.

ter in that of Shafteſbury, but it was little relied on, and the contrary doctrine ſeemed to be conſidered in general in all the bribery cauſes as unqueſtionable, viz. That a petitioner who proves bribery on the ſitting member, muſt alſo diſqualify by bribery, or otherwiſe, a ſufficient number of the ſitting member's votes to leave himſelf a majority, before he can be entitled to the ſeat.

4. If a candidate, or his agent, give, or promiſe money, or other reward, to a voter, in order to procure his vote for ſuch candidate, and the voter afterward vote for another candidate, is the firſt thereby diſqualified from ſitting even if he have a majority of legal votes?

The counſel for the petitioner in the caſe of Shafteſbury maintained the negative of this propoſition; yet, upon the ſame general, though inaccurate idea of an invaſion of the freedom of election, on which alone the determination mentioned under the ſecond queſtion muſt have proceeded, it would ſeem that the affirmative ought to be adopted. It has been determined, by the Court of King's Bench, that, in ſuch a caſe, the penalties of the ſtatute of George II. are incurred by the corrupter (1).

5. If an elector receive a bribe, and in conſideration thereof engage to vote for one candidate, and at the election vote for another, on whoſe behalf he has received no bribe, is the gratuitous vote given by ſuch elector for the other a good vote, or void?

It was generally underſtood by the counſel, that, according to the ſtate of the poll in the caſe of Saint Ives, Mr. Drummond could not have been declared duly elected, if the Committee had not thought that ſuch votes were void. The Committee, in the caſe of Shafteſbury, was alſo ſuppoſed to have been of this opinion: the ground of which is this, That, by the oath preſcribed by the ſtatute of George the Second, the elector muſt ſwear, that he hath received no money, &c. "*in order to "give his vote at that election.*" An elector who refuſes this oath cannot vote. Therefore if he is proved to have been in ſuch a ſituation at the election, that he could not have taken the oath without perjury, his vote, according to the true conſtruction of the ſtatute, ought not to be allowed. I have heard, however, that ſome very diſtinguiſhed characters in Weſtminſter-hall hold a contrary opinion. They think that the meaning of the oath is, that the elector ſhall ſwear that he had not received any money, &c. in order to vote for the perſon for whom he did vote. That at any rate, till the oath is tendered and refuſed, it can have no effect, and that the validity of the vote, till then, muſt d pend on the general principle of the freedom

(1) Sulſton v. Norton, 3 Burr. p. 1235.

freedom of choice. That the choice made by the elector in the caſe put, is free, and unbiaſſed. That it is unqueſtionable that, if ſuch elector had a vote at any other place, he might there, after receiving the bribe, vote for a perſon who had not bribed him, (unleſs he had been previouſly convicted according to Sect. 7. of the ſtatute of George the Second.) That he might vote at the election of any other officer; as a mayor, a ſheriff, &c. and his vote in thoſe caſes would be good; and that the election of one member for a place is as diſtinct a thing from the election of the other, as the election of a member for one place is from that of a member for another; or as that of a member of Parliament is from that of a ſheriff or other officer. This idea is elucidated, if not corroborated, by what has been ſaid in the caſe of Briſtol, note (B), to ſhow that formerly the two members for a place were not choſen *ſimul & ſemel*, and that there is no law which makes it neceſſary that they ſhould be ſo choſen, at this day.

6. If an elector is proved to have acted as an agent in bribing other electors, but there is no proof that he himſelf was bribed, is his vote a good vote, or void?

Thoſe who argue that it is void, ſay that the acting as an agent in bribing others is ſuch an infringement of the freedom of election, that the law will *preſume* that ſuch agent was as little ſcrupulous with regard to himſelf, as he had been with regard to others.

7. If an elector receive a bribe in order both to vote himſelf, and to procure the votes of others, and he from that corrupt motive do procure the votes of others, but without corrupting them, and merely by perſuaſion, or a juſtifiable influence which he may have over them, ſhall the votes ſo procured be conſidered as good, or as being void?

I am not aware that this queſtion has ever been agitated before a Committee of elections; but it was the chief point in the caſe of the annual election of the magiſtrates of the borough of Stirling in Scotland, for Michaelmas 1773, and the court of ſeſſion, 1 March 1775, avoided the election on the ground that ſuch votes were bad (1). As they muſt have determined this upon general principles, thoſe principles would be equally applicable to votes at an election of a member of Parliament. But the deciſion was carried by a very ſmall majority; I believe only of one voice; and an appeal was brought in the Houſe of Lords, which ſtands firſt to be heard when the Parliament meets.

The

(1) John Paterſon and others againſt James Alexander, Eſq. and others. See the Interlocutor in the caſe of the Reſpondents, p. 13. and in the caſe of the Appellants, p. 3.

☞ The reſolution of the Houſe concerning bribery, which is cited in the caſe of Hindon (1), has been renewed at the beginning of every ſeſſion, ever ſince 13 Feb. 1700-1. (2).

(1) *Supra*, vol. i. p. 99.
(2) Journ. vol. xiii. p. 326, 327.

XXIV. THE

XXIV.

THE

CASE

Of the DISTRICT of

NORTH BERWICK, HADDINGTON, LAUDER, JEDBURGH, and DUNBAR,

In SCOTLAND.

The Committee was choſen, on Tueſday, the 2d of May, and conſiſted of the following Gentlemen.

Lord George Germaine, Chairman,	Members for	Eaſt Grinſtead.
Charles Wolſeley, Eſq.		Milborne Port.
Lord Charles Spencer,		Oxfordſhire.
William Strahan, Eſq.		Malmeſbury.
John Ordé, Eſq.		Midhurſt.
Sir Philip Hales, Bart.		Downton.
Anthony Eyre, Eſq.		Boroughbridge.
John Scudamore, Eſq.		Hereford.
Alexander Popham, Eſq.		Taunton.
Richard Benyon, Eſq.		Peterborough.
Charles Morgan, Eſq.		Breconſhire.
Edmund Burke, Eſq.		Briſtol.
Robert Laurie, Eſq.		Dumfrieſſhire.
NOMINEES.		
Of the Petitioner,		
Fletcher Norton, Eſq.		Carliſle.
Of the Sitting Member,		
Sir Cecil Wray, Bart.		Eaſt Retford.

PETITIONERS.

Sir Alexander Gilmour, Bart.

Andrew Dickſon, Eſq. &c. Conſtituent Members of the Town Council of the borough of Haddington, at Michaelmas, 1774.

The Magiſtrates and Town Council of North Berwick.

The Provoſt, Magiſtrates, and Town Council of the borough of Dunbar.

Sitting Member.

The Hon. John Maitland.

COUNSEL

For the Petitioners.

Mr. Croſby, Mr. Lee.

For the Sitting Member.

Mr. Rae, Mr. Hardinge.

THE CASE

Of the DISTRICT of

NORTH BERWICK, &c.

ON Wedneſday, the 3d of May, the Committee being met, and the petitions read, they all appeared to contain the ſame allegations, *viz.*

That, at the election of a member to repreſent the boroughs of North Berwick, Haddington, Lauder, Jedburgh, and Dunbar, at North Berwick, the preſiding borough of the diſtrict for the time, on Monday the 31ſt of October, 1774, commiſſions were produced in favour of perſons named as delegates for the ſeveral boroughs; and David Kinloch, Eſq. appeared, and claimed a vote, as having been the perſon duly elected delegate for the borough of Haddington, though a commiſſion had been made out in favour of Robert Burton, Eſq. provoſt of Haddington; and accordingly he gave his vote at the election, under proteſt; and that the delegates producing commiſſions from the boroughs of Haddington, Lauder, and Jedburgh, voted for the honourable John Maitland, clerk of the Pipe in the court of Exchequer in Scotland, and the delegates from North Berwick and Dunbar voted for Sir Alexander Gilmour, the petitioner. That Mr. Maitland had been returned, but Sir Alexander Gilmour was duly elected, and was therefore induced to make the preſent application for redreſs; for that Mr. Maitland was incapable of repreſenting this diſtrict of boroughs, or ſitting as a member in the Parliament of Great Britain (A), by virtue of the ſtatute of the 6th Anne, cap. 7. § 5. his office of clerk of the Pipe,

Pipe, in the court of Exchequer in Scotland, having been created or erected ſince the 25th of October, 1705; and that, beſides this, the two commiſſions for the boroughs of Haddington and Jedburgh granted to Mr. Burton, and Mr. Hogg, as their delegates, were granted by perſons who were by law incapable of electing a delegate, having no right themſelves to the offices they aſſumed in the ſaid boroughs; and the ſaid commiſſions were procured by bribery, corruption, and undue influence; and, if there were any perſons entitled to elect a delegate for the borough of Haddington, David Kinloch was the perſon duly elected, and his vote only was a good vote; and that, in conſequence of theſe and many other objections to the election of Mr. Maitland, it would appear that Sir Alexander Gilmour was the perſon duly elected for the ſaid diſtrict of boroughs; Praying therefore, (1), &c.

From this ſtate of the allegations of the ſeveral petitions, it appears that, the two general queſtions in the caſe were,

1. Whether Mr. Maitland was eligible.

2. Whether, he, or Sir Alexander Gilmour, had the majority of legal votes.

It was propoſed by the Committee, that the firſt queſtion ſhould be argued and determined ſeparately.

By the ſtatute of the 6th of Anne, cap. 7. § 25. it is enacted as follows:

"That no perſon, who ſhall have in his own name, or "in the name of any perſon or perſons in truſt for him, or "for his benefit, any new office or place of profit whatſo"ever under the Crown, which at any time ſince the five "and twentieth day of October, in the year of our Lord "One thouſand ſeven hundred and five, have been *created* "or *erected*, or hereafter ſhall be created or erected, ſhall "be capable of being elected, or of ſitting or voting as a "member of the Houſe of Commons, in any Parliament "which ſhall be hereafter ſummoned and holden."

The counſel for the petitioners contended, that the office of clerk of the Pipe, which Mr. Maitland was admitted to have been poſſeſſed of at the time of the election, was a new office of profit, under the Crown, within the meaning and deſcription of the ſtatute.

In the following ſtate of the material circumſtances concerning this part of the caſe, the facts were, in part, admitted,

(1) Votes, 7 Dec. 1774. p. 44, 45.

THE CASE

Of the DISTRICT of NORTH BERWICK, &c.

ON Wedneſday, the 3d of May, the Committee being met, and the petitions read, they all appeared to contain the ſame allegations, *viz.*

That, at the election of a member to repreſent the boroughs of North Berwick, Haddington, Lauder, Jedburgh, and Dunbar, at North Berwick, the preſiding borough of the diſtrict for the time, on Monday the 31ſt of October, 1774, commiſſions were produced in favour of perſons named as delegates for the ſeveral boroughs; and David Kinloch, Eſq. appeared, and claimed a vote, as having been the perſon duly elected delegate for the borough of Haddington, though a commiſſion had been made out in favour of Robert Burton, Eſq. provoſt of Haddington; and accordingly he gave his vote at the election, under proteſt; and that the delegates producing commiſſions from the boroughs of Haddington, Lauder, and Jedburgh, voted for the honourable John Maitland, clerk of the Pipe in the court of Exchequer in Scotland, and the delegates from North Berwick and Dunbar voted for Sir Alexander Gilmour, the petitioner. That Mr. Maitland had been returned, but Sir Alexander Gilmour was duly elected, and was therefore induced to make the preſent application for redreſs; for that Mr. Maitland was incapable of repreſenting this diſtrict of boroughs, or ſitting as a member in the Parliament of Great Britain (A), by virtue of the ſtatute of the 6th Anne, cap. 7. § 5. his office of clerk of the Pipe,

Pipe, in the court of Exchequer in Scotland, having been created or erected ſince the 25th of October, 1705; and that, beſides this, the two commiſſions for the boroughs of Haddington and Jedburgh granted to Mr. Burton, and Mr. Hogg, as their delegates, were granted by perſons who were by law incapable of electing a delegate, having no right themſelves to the offices they aſſumed in the ſaid boroughs; and the ſaid commiſſions were procured by bribery, corruption, and undue influence; and, if there were any perſons entitled to elect a delegate for the borough of Haddington, David Kinloch was the perſon duly elected, and his vote only was a good vote; and that, in conſequence of theſe and many other objections to the election of Mr. Maitland, it would appear that Sir Alexander Gilmour was the perſon duly elected for the ſaid diſtrict of boroughs; Praying therefore, (1), &c.

From this ſtate of the allegations of the ſeveral petitions, it appears that, the two general queſtions in the caſe were,

1. Whether Mr. Maitland was eligible.

2. Whether, he, or Sir Alexander Gilmour, had the majority of legal votes.

It was propoſed by the Committee, that the firſt queſtion ſhould be argued and determined ſeparately.

By the ſtatute of the 6th of Anne, cap. 7. § 25. it is enacted as follows:

"That no perſon, who ſhall have in his own name, or "in the name of any perſon or perſons in truſt for him, or "for his benefit, any new office or place of profit whatſo-"ever under the Crown, which at any time ſince the five "and twentieth day of October, in the year of our Lord "One thouſand ſeven hundred and five, have been *created* "or *erected*, or hereafter ſhall be created or erected, ſhall "be capable of being elected, or of ſitting or voting as a "member of the Houſe of Commons, in any Parliament "which ſhall be hereafter ſummoned and holden."

The counſel for the petitioners contended, that the office of clerk of the Pipe, which Mr. Maitland was admitted to have been poſſeſſed of at the time of the election, was a new office of profit, under the Crown, within the meaning and deſcription of the ſtatute.

In the following ſtate of the material circumſtances concerning this part of the caſe, the facts were, in part, admitted,

(1) Votes, 7 Dec. 1774. p. 44, 45.

admitted, and, in part, proved by authenticated papers, and by the parole teſtimony of Mr. Walker and Mr. Mackenzie, two attorneys belonging to the court of Exchequer in Scotland.

There exiſted in Scotland a court of Exchequer, as far back as any authentic hiſtory of that country goes. The court conſiſted of the Lords of the Exchequer, and a number of clerks and other inferior officers. By an *eſtabliſhment*, or account of the officers of the Exchequer and their ſalaries, which bears date in 1698, and is the lateſt to be found before the union, it appears that there were then belonging to the court.—A clerk of the ſheriff's roll, a clerk of the borough roll, two clerks to the Lord Regiſter and Exchequer, and a preſenter of ſignatures. All theſe clerks held their offices for life, by virtue of commiſſions *from the Lord Regiſter*. The ſalary of the firſt was only 136l. 13s. Scots. Of the ſecond 180l. Scots. Of the two clerks of Exchequer 1000l. Scots. In the commiſſion to a clerk of Exchequer, he was ſtyled deputy to the Lord Regiſter, dictator of the rolls, and keeper of the property-roll.

By the treaty of union, all the ordinary courts of juſtice in Scotland were left with their former conſtitutions and juriſdictions. But with regard to the Exchequer, there was the following ſtipulation: "That there be a court of "Exchequer in Scotland after the union, for deciding "queſtions concerning the revenues of cuſtoms and ex-"ciſes there, having the ſame power and authority in ſuch "caſes, as the court of Exchequer has in England; and "that the ſaid court of Exchequer in Scotland have power "of paſſing ſignatures, gifts, tutories, and *in other things*, "as the court of Exchequer at preſent in Scotland hath; "and that the court of Exchequer that now is in Scotland "do remain, until a new court of Exchequer be ſettled "by the Parliament of Great Britain in Scotland after the "union (1)."

In the year following, (1707) a court of Exchequer was "ſettled, eſtabliſhed, erected, and conſtituted," in Scotland, according to the above ſtipulation, by the ſtatute of the 6th of Queen Anne, cap. 26.

It was thereby enacted, that the Lord High Treaſurer of England, a Chief Baron, and four Barons to be (2) appointed by the Crown, ſhould be judges of the court, and

(1) Act. 19. (2) Sect. 24.

and ſhould hold their offices "*quamdiu ſe bene geſſerint* "(2)."

The third and twenty-firſt ſections are in the following words.

"Sect. 3. And it is further enacted by the authority "aforeſaid, that there ſhall be in the ſaid court of Exche- "quer in Scotland, the ſeveral offices following, that is to "ſay, the office of Queen's remembrancer, the office of "Lord Treaſurer's remembrancer, the *office of clerk of the* "*Pipe*, and ſuch other offices now in being in the court of "Exchequer in England, or [as] are now in being in "Scotland, relating to ſignatures, gifts, and tutories, as "the Queen's Majeſty, her heirs and ſucceſſors, ſhall from "time to time think fit and proper, to be conſtituted and "appointed under the ſeal which by the ſaid articles of "union is appointed to be kept in Scotland; and that ſuch "perſons ſhall be the maſters or chief officers of and in "the ſaid reſpective offices, and for ſuch term, eſtate, "and intereſt therein, as the Queen's majeſty, her heirs "and ſucceſſors, ſhall from time to time by letters patent "under the ſeal aforeſaid ordain or appoint, and that the "ſaid maſters or chief officers of the aforeſaid ſeveral offi- "ces ſhall have and appoint from time to time under them, "and in their reſpective offices, ſuch and ſo many attor- "neys and clerks as ſhall be fit and proper for the buſineſs "in their reſpective offices; which ſaid maſters and chief "officers, as alſo the ſaid attorneys and clerks, ſhall, before "their admiſſions into their offices or places reſpectively, "take ſuch oath or oaths in the ſaid court, or before the "Chief Baron, or one of the Barons of the ſaid court, for "their faithful and honeſt carriage and behaviour in their "ſaid offices reſpectively, as the like officers, attorneys, "and clerks in the court of Exchequer in England have "uſed and ought to do, or as by the Barons of the ſaid "court of Exchequer in Scotland ſhall for that purpoſe be "deviſed and appointed.

Sect. 21. "Provided always, and be it enacted, that "the *two principal clerks of Exchequer* in Scotland, and "other officers in that court, who have grants of their of- "fices during life, or of inheritance, ſhall enjoy their of- "fices according to the nature of their gifts, except in ſo "far as theſe offices are inconſiſtent with the conſtitution

 "of

(2) Sect. 2.

"of Exchequer, as the ſame is ſettled by this act: In "which caſe, be it enacted by the authority aforeſaid, "that any perſon having right to any ſuch office, ſhall be "provided in one or other of the offices eſtabliſhed by this "act, equal in value to what they now enjoy, to hold for "life, or in fee reſpectively, or have ſome other equiva-"lent recompence for the loſs of ſuch office."

At the time of the union, the two clerks of Exchequer were Mr. Colin Mackenzie, and Mr. William Stuart.

After the eſtabliſhment made by the 6th of Queen Anne, cap. 26. took place, a new commiſſion was granted *by the Crown* to Mr. Mackenzie, appointing him *clerk of the Pipe*, jointly with Mr. Tyas, an Engliſh lawyer, and another to Mr. Stuart, appointing him joint Queen's remembrancer with Mr. Tarvar, who was alſo an Engliſh lawyer. Mr. Mackenzie, in his new commiſſion, was ſtyled *Recordator magni rotuli, ſive clericus pipæ.* In the ſubſequent commiſſion, the word "*ingroſſator*" was ſubſtituted for "*recordator.*" The former preſenter of ſignatures continued to enjoy the ſame office without a new commiſſion, and that office ſtill ſubſiſts in Scotland.

The clerk of the Pipe has no functions relative to the duty of the court of Exchequer as a court of Engliſh law; the accounts which paſs through his hands are thoſe relating to the exciſe, cuſtoms, ſeizures, land-tax, and ſalt-tax. Theſe accounts are firſt enrolled by each of the remembrancers, and then by the clerk of the Pipe (1). There are not in the office of the latter any records prior to the Union. The property-roll is now kept by the King's remembrancer.

COUNSEL for the petitioner.

It is evident, from the words of the ſtatute eſtabliſhing the new court of Exchequer in Scotland, as well as from a compariſon between the functions of the clerk of the Pipe, and of the former clerks of the Exchequer, that the office of clerk of the Pipe was *created* by the ſtatute. It is impoſſible to prove an analogy between this office, and that of any of the former clerks. It is ſuppoſed, that it will be ſaid to be the ſame with *dictator of the rolls*; but if ſo, why was

(1) 6 Anne, cap. 26. Sect. 11.

was a new commiſſion thought neceſſary for Mr. Mackenzie, or for Mr. Stuart? There was no new commiſſion granted to the preſenter of the ſignatures, becauſe his office continued under the new eſtabliſhment.

If the clerk of the Pipe had any part of the department of any of the old officers, ſome records relating to that department would ſtill remain in his cuſtody. But even if a diſtant reſemblance were to be traced between one of the old, and this new office, ſtill, as the former were in the gift of the Lord Regiſter, and this is appointed to by the Crown, it is new in that reſpect, and is therefore within both the words and the ſpirit of the diſqualifying clauſe of 6th Anne, cap. 7.

COUNSEL for the ſitting member.

The intention of the legiſlature, with regard to the diſqualifying clauſe, in the act of the 16th of Queen Anne, will be beſt known by tracing its hiſtory.

Before the Revolution, there was no ſtatute by which the holder of any office was diſabled from ſitting in Parliament. By the 12th and 13th of William the Third, cap. 2. called *the act of ſettlement*, it was provided, that after the limitation of the Crown to the Houſe of Brunſwick ſhould take effect, no perſon who ſhould hold an office or place of profit under the King, or ſhould receive a peuſion from the Crown, ſhould be capable of ſerving as a member of the Houſe of Commons (7). This proviſion was ſoon diſcovered to be too rigid. It was perceived, that ſuch a general diſqualification of all officers appointed by the Crown, would be attended with the utmoſt inconvenience, by excluding from the legiſlative body, thoſe men, who, from their abilities and experience, were beſt fitted for giving information to the Houſe, relating to the different branches of the public buſineſs. Accordingly, in the 4th year of Queen Anne, a new act of ſettlement took its riſe in the Houſe of Lords, in which was inſerted a general repeal of the diſqualifying clauſe in the former. The Commons, unwilling to agree to this general repeal, propoſed, when the bill was ſent down to them, that particular offices ſhould be excepted, and the diſqualification remain as to all others. A conference enſued between the two Houſes, and a middle

(7) §. 3.

dle courſe was ſuggeſted by the Lords, and adopted; viz. that all new offices, and certain old ones, to be ſpecified in the act, ſhould diſqualify; and that all the other offices then exiſting ſhould be tenable with a ſeat in Parliament.

The act accordingly paſſed (1), and the diſqualifying clauſe was penned in the very ſame terms with that of the ſubſequent ſtatute of the 6th of Queen Anne, cap. 7.

The reaſons of the Lords for not agreeing to the amendment propoſed by the Commons, and for propoſing the plan which was adopted, are to be found in the xvth vol. of the Journals, and are to be conſidered as a parliamentary explanation of the meaning of both the acts. The 6th reaſon is as follows, "The amendment made by the Lords, "ſecures the kingdom againſt future exceſſes, in multi- "plying offices (*not neceſſary* for the intereſt of the go- "vernment) upon any *indirect account*, by diſabling all "who ſhall hereafter come into any new created, or erec- "ted offices, from being elected, or from ſitting or voting "as members of the Houſe of Commons (2)." From this it is very clear that the object was to exclude, not offices created by Parliament, which would not be preſumed capable of *indirect purpoſes* in ſuch creation, but offices which the Crown might create without neceſſity, and with the diſguiſed intention of extending its influence. The ſtatute of the 4th of Queen Anne, having been made before the union, did not extend to Scotland, and, therefore, in the firſt Parliament of Great Britain, a clauſe was inſerted in the ſtatute of the 6th year of that reign, cap. 7. in the ſame words with the former, clearly for no other purpoſe but to carry the proviſion of the former to the other part of the united kingdom. It cannot, therefore, affect an office, which, ſo far from being created by the Crown for an indirect purpoſe, was eſtabliſhed by Parliament, in conſequence of a ſolemn treaty between the two kingdoms.

In 1730, in conſequence of an addreſs to the King, Mr. Frecker, of the treaſury, delivered into the Houſe a liſt of all the offices under the Crown, which had been erected ſince the 25th of October, 1705. The object of the application to the King for this liſt, was to aſcertain what perſons

(1) 4 Anne, cap. 8.
(2) Journal 11 Feb. 1705-6, vol. xv. p. 140.

perſons were diſqualified from ſitting in Parliament (3). That liſt conſiſts of five folio pages, but it contains only offices created by the Crown; and at the end of it, there are theſe words, "All the offices or employments under the "Crown in Scotland, were ſettled and eſtabliſhed in con- "ſequence of the union of the two kingdoms, which took "place the 1ſt of May, 1707, and it is humbly appre- "hended they were not deſigned to be included in this ac- "count (4)."

This ſhows, that at that time, when the ſubject of diſqualifying offices was ſo much agitated, it was underſtood that thoſe created in conſequence of the treaty of union, were not of that ſort. If the Houſe had not thought ſo, they would have deſired that ſuch offices ſhould be added to the liſt.

What has been hitherto ſaid, would apply to the office of the clerk of the Pipe, if it clearly were a new office, ſince 1705. But that is not the caſe. The court of Exchequer had always two provinces; That of managing the revenue accounts, and that of judging revenue cauſes. This appears from a number of Scotch acts of Parliament, 1ſt Parl. of Car. I. cap. 18, (which refers to one of James the Firſt of Scotland, on the ſame ſubject) 1ſt Parl. of Car. II. cap. 59. 2d Parl. Car. II. cap. 12, 3d ſeſ. of 2d Parl. Car. II. cap. 16. The court, therefore, eſtabliſhed after the union, was in ſubſtance the ſame with the former. In a manuſcript treatiſe, aſcribed to Baron Scrope, and written in the reign of George the Second, the buſineſs of the court is ſaid to have been the ſame for 300 years back. It had the ſame general functions; but, as the Engliſh law relating to the cuſtoms and exciſe was extended to Scotland, ſuch alterations were neceſſary, as might enable it to try and determine queſtions ariſing on thoſe ſubjects, according to the law of England. The Engliſh names were adopted both for the judges and officers of the court, and it was found expedient to have Engliſh gentlemen, converſant in that law, appointed to ſome of the offices. Accordingly, two Engliſh gentlemen were joined with the two clerks of the Exchequer, and for that purpoſe new joint commiſſions were neceſſary.

The

(3) 16 Feb. 1729-30, Journ. vol. xxi. p. 441.
(4) Journ. vol. xxi. p. 525. 3 April, 1730.

The court of Exchequer ought to be conſidered as one great ancient office, new modelled, after the union, and conſiſting of a number of members, who, after that æra, received new names, and new powers. Is it then contended, that new powers beſtowed upon an old office, work a diſqualification? Would the Lord High Treaſurer of England, if a commoner, be diſqualified from ſitting in Parliament, becauſe, ſince 1705, to the former functions of his office, are added thoſe of a member of the court of Exchequer in Scotland?

A ſuperadded ſalary, according to the ſpirit of the ſtatute of Queen Anne, might, with more reaſon, be ſuppoſed to have that effect on an old office. But that this is not ſo, was determined by the Houſe, in the caſe of Mr. Corbett, returned for the borough of Saltaſh in 1739.

"The 20th February, 1739-40, a motion being made, "and the queſtion put, that Mr. Speaker do iſſue his war- "want to the clerk of the crown, to make out a new writ "for a burgeſs, to ſerve in this preſent Parliament, for "the borough of Saltaſh, in the county of Cornwall, in "the room of Thomas Corbett, Eſq. who hath accepted "of a ſalary of 200l. per annum, by his Majeſty's royal "ſign manual, dated the 14th of Auguſt, 1739, as ſecre- "tary to the court of aſſiſtants, for relief of poor widows "of commiſſion and warrant officers, of the royal navy, "eſtabliſhed by virtue of a commiſſion, under the great "ſeal, bearing date the 30th of Auguſt, 1732."

It paſſed in the negative, on a diviſion, 223 to 132 (5).

Great ſtreſs is laid upon the difference in the appointment to the clerkſhips in the Exchequer before and ſince the union. But, in the firſt place, it is not clear but that the King might, when he choſe, appoint to thoſe offices before the union. We learn from Lord Fountainhall, that in the commiſſion of Lord High Treaſurer of Scotland, granted to the Duke of Queenſberry in 1682, the power of appointing the clerks in the Exchequer was given to him. And the ſame author adds, that formerly the King uſed to appoint them (6).

In the ſecond place, an old office, by coming to be in the appointment of the Crown, does not, on that account, incapa-

(5) Journ. vol. xxiii. p. 473. col. 1, 2.
(6) Vol. i. p. 186.

incapacitate from being choſen and ſitting in Parliament. Before the rebellion in 1745, the office of high ſheriff in Scotland was hereditary, and every high ſheriff appointed his own deputy. Soon after that epoch, by a ſtatute of the 20th of George the Second, cap. 43, the hereditary ſheriffdoms were aboliſhed, and the appointment both of high ſheriffs and of ſheriffs depute veſted in the Crown (B). The judicial authority, formerly exerciſed by the high ſheriffs, was given to the deputes. Yet the legiſlature did not think that either their new powers, or the circumſtance of their being now appointed by the Crown, brought them within the meaning of the ſtatute of the 6th of Queen Anne. When it was found expedient to render them incapable of ſerving in Parliament, an expreſs proviſion in a ſubſequent ſtatute was neceſſary for that purpoſe (1).

After what has been ſaid, it will not be thought neceſſary to aſcertain with accuracy, what the functions of any of the Clerks in the Court of Exchequer before the union are, which are now exerciſed by the clerk of the Pipe. At this diſtance of time it is very difficult to trace all the duties, peculiar to the different clerks under the old eſtabliſhment. The reſpective accounts in each different department ſeem to have been enrolled only in that department. The clerk of the Pipe, who now enrolls all the accounts after the two remembrancers, and is thereby a check upon them, does, in that reſpect, the duty of all the former clerks. From the reſemblance of the names of dictator of the rolls, and *ingroſſator magni rotuli*, it is probable, if the nature of the duties of the dictator of the rolls were better known, that we ſhould find that they correſpond with thoſe of the clerk of the Pipe.

If the law on the preſent queſtion were doubtful, uſage, the beſt interpreter of doubtful laws, is ſtrongly in favour of the ſitting member. From the 6th of Queen Anne, down to the preſent time, both clerks of the Pipe and remembrancers of the Exchequer, (and if the former had been within the meaning of the ſtatute, the latter muſt have been ſo likewiſe), have been returned, and have ſat in Parliament. William Stuart, the firſt King's remembrancer, was elected and returned in 1713 for the diſtrict of Inverneſs, Nairn, Forres, and Fortroſe, and ſtyled in the

(1) 21 Geo. II. cap. 19. § 11.

the return, William Stuart, remembrancer of the Exchequer. In 1747 Andrew Fletcher, junior, of Saltown, then clerk of the Pipe, was elected and returned for the diſtrict which is the ſubject of the preſent conteſt. In 1754, John Stuart, of Caſtle-Stuart, who had ſucceeded Fletcher in the office of clerk of the Pipe, was re-elected for the place which he repreſented when he accepted of the office. In the return he alſo was particularly deſcribed as clerk of the Pipe. (☞ The returns in the inſtances juſt ſtated were given in evidence.)

In 1769 there was a conteſt for this very diſtrict of boroughs, between Mr. Warrender, King's Remembrancer, and Mr. Ogilvie. The former was returned, and a petition was preſented againſt him, but there was no objection taken to his eligibility, although one of the counſel for the preſent petitioner was one of the delegates who on that occaſion had voted for Ogilvie. The doctrine which he now maintains is ſuch a novelty, as never to have been heard of in Scotland ſix years ago.

If any members of the court of Exchequer in Scotland, under the new eſtabliſhment, were diſqualified by the 6th of Queen Anne, the Barons themſelves muſt have been ſo. But, before the ſtatute of the 7th of George the Second, cap. 16. by which they and the Lords of Seſſion were expreſsly diſqualified, there are two inſtances of their ſitting in Parliament; thoſe of Baron Scrope and Baron Miller. In 1727, the latter had been a candidate for the borough of Petersfield, together with Mr. Taylor, who was returned. Baron Miller petitioned the Houſe. The Committee of elections, the petition having been referred to them, reported in favour of Taylor, though not on the ground of Miller's ſuppoſed incapacity.—It would ſeem that that point was not ſtarted in the Committee. But the Houſe diſagreed from the reſolution of the Committee. When a motion was made, and the queſtion propoſed, that Miller was duly elected, the 19th article of the treaty of union, and the 25th ſect. of the 6th of Queen Anne, were read, ſo that *then* his eligibility was queſtioned; yet it was reſolved, 9 May, 1727, that he was duly elected (1).

COUNSEL

(1) Journ. vol. xx. p. 861. col. 2.

COUNSEL for the petitioner, in reply.

The ſtatutes of the 12th and 13th of William the Third, and of the 4th of Queen Anne, have nothing to do with the preſent queſtion. As to what paſſed in the two Houſes on occaſion of the latter, that could have been of no weight, if the queſtion had ariſen on that very ſtatute, ſince, in conſtruing laws, a court of juſtice muſt not be led from the plain meaning of the words, by what they may gueſs concerning the hiſtory, of the law.

According to the doctrine of the counſel for the ſitting member, the ſtatute of the 6th of Queen Anne is to be conſtrued as if after the words "created or erected," there had followed theſe words, "*by the royal authority.*" But no ſuch reſtrictive conſtruction is authorized by any thing in the ſtatute, or by any deciſion of the Houſe upon it. In the liſt delivered into the Houſe, in 1730, there are offices created by Parliament; for inſtance, the office of the commiſſioners for hackney coaches. Mr. Frecker's opinion of the meaning of the orders given to him, can ſurely be of no conſequence in the interpretation of an act of Parliament. The object of the ſtatute was to prevent the influence of the Crown. That influence is equally great over a perſon holding an office in the gift of the Crown, whether his office was originally created by the royal prerogative or by act of Parliament.

The circumſtance related by Lord Fountainhall concerning the Duke of Queenſberry's commiſſion, only proves that the Crown, on that occaſion, had encroached on the rights of the ſubject. His book furniſhes many inſtances of the ſame ſort in thoſe times. As to the caſe of the ſheriff's depute, their's cannot be conſidered as a new office; for the King, by the ſtatute of the 20th of George the Second, had all the powers of the hereditary ſheriffs veſted in him, and therefore, of courſe, came to name the deputies, as being as it were high ſheriff in every county in the kingdom.

The caſe of Mr. Corbett has no analogy to the preſent.

The caſe of Baron Scrope can prove nothing, as it paſſed *ſub ſilentio.* That of Baron Miller happened in factious times. The diſqualifying clauſe in the ſtatute of the 7th of George the Second was probably inſerted, as far as regards the Barons of the Exchequer, to *declare* the law, and prevent

prevent the caſe of Miller from being conſidered as a precedent.

As to the uſage, the whole amount of the evidence concerning the office now in queſtion is, that two perſons holding it have ſat in Parliament, to whom there does not appear to have been any oppoſition. Theſe, therefore, are alſo caſes which paſſed *ſub ſilentio*. It cannot be contended, that two inſtances of offenders againſt a ſtatute, who eſcaped with impunity, are ſufficient to repeal that ſtatute. The deſcription of thoſe two perſons as clerks of the Pipe, in the returns, at a time when there was no conteſt, has very much the appearance of an attempt to create a precedent againſt the obvious meaning of the ſtatute.

The counſel for the ſitting member have not been able to trace any ſimilarity between the office of dictator of the rolls and that of clerk of the Pipe, although they wiſh the Committee to conſider them as one and the ſame. The *magnus rotulus*, whence the clerk of the Pipe derives a name in which they find ſome reſemblance to that of *dictator of the rolls*, certainly did not exiſt in Scotland before the union. The thing and the name both were taken from the court of Exchequer in England, where the clerk of the Pipe is alſo ſtyled *ingroſſator magni rotuli*.

☞ They denied that the manuſcript referred to by the counſel for the ſitting member was written by Baron Scrope, and ſaid that it is of no authority, and is never quoted in the court.

The Committee, after deliberation, informed the counſel that they were of opinion,

"That the Hon. John Maitland was eligible to ſerve in "Parliament, notwithſtanding his being in poſſeſſion of "the office of clerk of the Pipe in the Exchequer of Scot-"land, at the time of his election."

The firſt queſtion being decided in favour of the ſitting member, it now became neceſſary for the counſel on the part of the petitioners to endeavour to ſhow that he had not the majority of legal votes.

Of the five delegates who produced commiſſions at the election, three voted for the ſitting member, and only two for Sir Alexander Gilmour. The commiſſions of thoſe delegates, whoſe votes were objected to, were authenticated in the manner preſcribed by the ſtatute of 16 Geo. II. cap. 11. § 30. ſo that, by the expreſs proviſion of that ſtatute, the

the clerk of the preſiding borough, who is clerk of the election meeting, and returning officer, was bound to receive their votes. Various objections were made at the election to the delegates for Haddington and Jedburgh. On the ſuppoſition that there was no legal delegate for Jedburgh, the right of preſidency devolved on Dunbar, and, on that ground, the delegate for Dunbar gave his caſting vote in favour of Sir Alexander Gilmour.

If the delegates for Haddington and Jedburgh were both illegal, Sir Alexander Gilmour had two legal votes, and Mr. Maitland only one. If only the delegate for Jedburgh was illegal, the voices were two and two, and the caſting vote of the delegate who in ſuch caſe had the right to preſide, was given for Sir Alexander Gilmour. So that, on either ſuppoſition, he would be entitled to be declared duly elected.

By the 9th ſection of the ſtatute of the 2nd of George the Second, cap. 24. it is enacted, "That the ſaid ſtatute "ſhall be openly read at the annual election of magiſtrates "and town counſellors for every borough within that part "of Great Britain, called Scotland."

This proviſion was not complied with at the laſt annual election of magiſtrates and counſellors, either at Haddington or Jedburgh.

The counſel for the petitioners argued, That this omiſſion rendered the election of the magiſtrates, and conſequently their election of delegates, void. That as no particular perſon is fixed upon by the ſtatute, for reading it at ſuch annual elections, who might be indictable if he neglected that part of his duty, the diſobedience of the poſitive command of the ſtatute cannot be puniſhed in any other way, but by ſetting aſide the whole proceedings at the election where it is not complied with. That, to give any ſubſtantial effect to this part of the law, it muſt be underſtood that ſuch was the intention of the legiſlature.

The counſel for the ſitting members inſiſted,

That this proviſion of the ſtatute was only *directory*, and they proved that it is not uſual to comply with it unleſs ſome member of the meeting deſire it, which was not done either at Haddington or Jedburgh.

☞ The counſel for the petitioners, in their reply, ſeemed to abandon this point.

No

No other objection was made to the delegate for Haddington.

The laſt election of magiſtrates and counſellors for Jedburgh, was objected to on two other grounds.—Bribery; and a departure from the *ſett* of the borough,

The counſel for the ſitting member contended, that the Committee were not competent to go into thoſe queſtions. This was a ſort of plea to the juriſdiction. They argued as follows.

Before the union, the Parliament of Scotland had never made any proviſion, concerning queſtions ariſing on the election of the magiſtrates and counſellors of the royal boroughs, but left any conteſt which happened on that ſubject, to the convention of boroughs, or the ordinary courſe of common law.

The firſt Britiſh ſtatute, where the election of thoſe magiſtrates and counſellors is mentioned, is that of the 7th of Geo. I. cap. 16. By the 7th ſection of that ſtatute, "It "is declared and enacted to be lawful for any magiſtrate "or counſellor of a borough who apprehends any wrong "was done at any annual election, to bring his action be"fore the court of ſeſſion in Scotland, for rectifying ſuch "abuſe, or for making void the whole election (if illegal) "*only* within the ſpace of eight weeks after ſuch election is "over."

By the 16th of George the Second, cap. 11. ſect. 24. the right of complaining was extended to the conſtituent members of any meeting for, or previous to, any election of magiſtrates or counſellors; and the limitation in point of time was made two kalendar months inſtead of eight weeks.

The preſent petitioners are not within the deſcription of the perſons entitled to complain under either of the two ſtatutes. They could not therefore have complained to the court of ſeſſion, whoſe juriſdiction is unqueſtionable, and ſurely their complaint is not competent before this Committee, which at moſt can only have a concurrent and coextenſive juriſdiction with that court.

If, in any caſe, ſuch a complaint can be heard, by a Committee of the Houſe of Commons, it can only be where application has been previouſly made to the court of ſeſſion, within the time limited by the act of Parliament; and that has

has not been done in the preſent inſtance (1). (☞ It appeared that a complaint had been lodged with the court of ſeſſion, within the two months, on the ground of the ſtatute of 2 Geo. II. cap. 24. not having been read; but there was no mention in that complaint of the ſuppoſed departure from the *ſett* of the borough, and the complainant had not proceeded in the cauſe, nor ſerved any warrant on the magiſtrates).

COUNSEL for the petitioners.

It appears by the ſtatutes which have been cited by the counſel on the other ſide, that neither a candidate, nor any member of another borough in the ſame diſtrict, can complain of the undue election of magiſtrates and counſellors for a borough in Scotland, to the court of ſeſſion. Yet, ſurely, this is a matter in which they are deeply intereſted, as it may materially affect the choice of the repreſentative in Parliament. Wherever there *may* be an injury, the law will always provide a remedy; and if the preſent petitioners have reaſon to think, that they have been injured in a caſe where they cannot receive redreſs in any other tribunal, this Committee is on that account more particularly bound to hear their complaint. The *direct* queſtion which is now propoſed for the deciſion of the Committee is, whether the delegate for Jedburgh was legally choſen, and they are the only court competent to *that* queſtion. But if the legality of the choice of the annual magiſtrates comes to be controverted, ſo as that muſt be determined before the legality of the choice of a delegate can be decided, there cannot be a doubt of the right of the Committee to decide that preliminary point. It is an incontrovertible maxim, that wherever a court has a right to decide on any point, that court may firſt enquire into, and determine, ſuch preliminary queſtions as are neceſſary to the ultimate determination.

If a previous complaint to the court of ſeſſion were neceſſary (which it certainly is not), ſuch a complaint has been made; and it ſurely was not neceſſary, in that complaint, to enter into all the objections to which the election of the magiſtrates was liable. No advantage can be taken of the complainant's not having proceeded in that cauſe, and

(1) See the caſe of Clackmannon, *ſupra*, p. 171.

and not having ſerved the parties complained of with a warrant, ſince the time allowed by the law of Scotland for that purpoſe is not yet elapſed.

The Committee determined immediately (without clearing the court) that the counſel for the petitioner ſhould proceed.

The election of magiſtrates for the borough of Jedburgh had been ſet aſide by the court of ſeſſion, in 1767, on the ground of bribery; ſo that the corporation was in a manner diſſolved; and it continued in that ſtate till July, 1774, when it was revived by a poll-election. The firſt annual election, after this revival of the borough, was that now complained of.

The counſel for the petitioners ſtated, that the laſt election of magiſtrates was produced by the influence of the ſame bribery and corruption which had occaſioned the former judgment of reduction, and they were going to produce evidence of that bribery, but the Committee reſolved not to hear any evidence of bribery, unleſs what could be ſhewn to have taken place, with an immediate deſign to influence the election under their conſideration. Upon this the counſel for the petitioner abandoned the point of bribery, and the only queſtion which now remained to be argued was,

Whether, at the laſt annual election of magiſtrates and town counſellors for Jedburgh, there had been ſuch a departure from the *ſett* of the borough as was ſufficient to vitiate and annul the election?

The conſtitution of a royal borough in Scotland, by which the mode of electing its annual magiſtracy is regulated, is called the *ſett* of the borough. The origin of thoſe ſetts is not known. They are thought to be derived from ancient charters which are now loſt; but uſage, in the progreſs of time, has probably occaſioned many deviations from the firſt forms preſcribed by the charters.

After the union, the magiſtrates and counſellors (who formerly elected the repreſentative of their borough in the Scotch Parliament) came to be the electors of the delegate, and as it was ſoon foreſeen that it would be very neceſſary to aſcertain the mode of chooſing the magiſtrates and counſellors in the different boroughs, the convention of boroughs, in 1709, ordered an account of the ſetts of each borough to be tranſmitted to them, which was accordingly done,

done, and they were inſerted in their books. The ſett of every borough is likewiſe preſerved in the corporation-books of that borough.

The following is an exact copy of the ſett of Jedburgh, as extracted from the corporation-books by the town-clerk, and produced by him to the Committee.

SETT of the Burgh of JEDBURGH.

"The way and manner of the annual election of the "magiſtrates and council of the burgh of Jedburgh is as "follows, *viz.* the councel conſiſts of twenty-five perſons "to wit, a provoſt, four baillies, dean of gild, and trea-"ſurer. There being eight trades who chooſe their dea-"cons yearly, four of theſe deacons are always upon the "counſel, the conveener being always one of the ſaid four. "The reſt of the councel conſiſts for the moſt part of mar-"chants and other inhabitants of ſeveral employments not "being tradeſmen, for no tradeſmen are allowed to be "upon the magiſtracy or councel except the four conncel "deacons.

"The election is *ordinarly* upon the twenty ſeventh, "twenty eight, and twenty ninth days of September "yearly. Some days before, to wit, upon the twenty "third, and twenty fourth of the ſaid moneth of Septem-"ber, the provoſt conveens the councel for taking of the "treaſurer's accompts for the preceding year, and for "electing and leeting of the new councel and deacons of "craft for the year to come; and which, with the old "councel, there being eleven choſen, *out of the two and "twenty*, for the new councel, and eight deacons of craft, "make up in the haill, with the old councel, the number "of fourty perſons, which elects the provoſt, four baillies, "dean of gild, and treaſurer for the enſuing year. Theſe "being ſo choſen and elected, the eight deacons are re-"moved from the councel table, and being removed, the "old and new councel elects four of theſe to be upon the "councel for the enſuing year. *Thereafter* the old and "new councel is all removed, except the magiſtrats, dean "of gild, and treaſurer, who puts out four of the old "councel, and takes in four of the new councel in their "room. *Thereafter* the eight trades conveens, and choiſes "one of the four councel deacons to be their conveener.

"This is a true ſett of the burgh of Jedburgh, extracted "furth of the records thereof. By

JNO. AINSLIE."

It appeared from the witneſſes that, by the uſage of the place, the manner of leeting the deacons is this.

The eight old deacons give in eight liſts or leets, each containing the names of three freemen of the reſpective eight companies or trades. The leets being approved of by the old council, are returned to the deacons, who, with their reſpective trades, elect one out of each, to be the deacon of that trade for the enſuing year. The eleven new counſellors are choſen by the old council before the leeting of the deacons, and are called day counſellors.

The words "*out of the two and twenty*," in the ſett, are ſuperfluous, and only perplex the ſenſe. The meaning of them is, that out of the twenty-two counſellors which make part of the forty, (which are called the long council) there are eleven new ones.

The material evidence on this part of the caſe conſiſted of the minutes of the laſt election, the corporation-books of Jedburgh, and the parole teſtimony of Mr. Ainſlie, joint town-clerk, of Jedburgh with one Fair, and of Bailie Anderſon, one of the magiſtrates. An objection was taken to the admiſſibility of the latter, but over-ruled.

It appeared, that, at the laſt election, the firſt meeting was on the 28th of September, and the election of magiſtrates on the 29th; but that the laſt ſtep, *viz.* the ſtriking off the four old counſellors, and chooſing the four new ones, which is called *purging* the council, did not take place till the 9th of October, which was after the precept for the election of a delegate had been received, and the day before the council met for appointing a peremptory day for chooſing the delegate. The minutes of the 29th, were written by Ainſlie, and one Bailie Brown his deputy. But the account of the purging the counſel was written by the other joint clerk's deputy, and this was carried on without a new date, in this manner, "*Thereafter*, &c." From the 29th, the books continued in the hands of Fair, till they were delivered up in conſequence of the Speaker's warrant.

An attempt was made to ſhow that leaves had been torn both out of the original minutes, and the book into which they are tranſcribed, with a fraudulent intention with regard

gard to the day when the purging happened; but nothing of that ſort was proved. On the contrary, the entry of the purging of the council by Fair's deputy, who was in the intereſt of the ſitting member, was continued on the very ſame page where Ainſlie had finiſhed the account of what was done on the 29th.

It was alſo ſhown, with a view to prove fraud, that, in the draught of the minutes for the election of a delegate, the name of Hogg was inſerted before the election began.

Ainſlie, who was called on the part of the petitioners, ſaid; That he had never acted as clerk at any annual election of magiſtrates and counſellors, but at the laſt, and at that in 1767, which has been mentioned to have been reduced by a judgment of the court of ſeſſion. That on that occaſion, the purging of the council had taken place ſome days after the election, and that it was entered in the books immediately after the entry of the election of magiſtrates, in the ſame manner as was done on the preſent occaſion, without any particular date. That there was no objection taken to that election on the ground of a deviation from the ſett. That, ſince the laſt election, although it had been much the ſubject of converſation at Jedburgh, he had never heard a ſuggeſtion in the borough, that the purging the council after the 29th of September was contrary to the conſtitution of the place.

Bailie Anderſon, who was called by the counſel for the ſitting member ſaid, That he was choſen a counſellor in 1751, and a magiſtrate in 1752. That he had often aſſiſted at purging the council, and never knew of its being purged the ſame day with the election of the magiſtrates, but always ſome days afterwards. That it is cuſtomary for the magiſtrates to go to church, to hold a court, and to do ſeveral corporate acts (which he ſpecified), after their election, and before the purging of the council. Yet, that in all the inſtances within his knowledge, the entries in the books had been as on the preſent occaſion, without any ſpecial date prefixed to the account of the purging the council.

It appeared from the inſpection of the books, as far back as they go, that the entries *purported*, that the elections had been begun and completed between the 29th and 23d of September, except in the year 1752, when the new

ſtyle was introduced. In that year, the firſt meeting was on the 4th, and the ſecond on the 5th of October.

COUNSEL for the petitioners.

The ſett of a borough in Scotland, as contained in the convention-books, is binding, and a departure from it vitiates the election; in the ſame manner as in England, before the ſtatute of the 11th of George I. cap. 4. an election of magiſtrates was not good, unleſs it was holden on the day preſcribed by the conſtitution of the borough (1).

This is the law in Scotland, even in caſes where there was no fault in the electors. In the year 1745, the rebels being in poſſeſſion of Edinburgh, Aberdeen, and other boroughs, at the time when the annual elections, by the conſtitutions of thoſe places, ſhould have taken place, they could not be holden at that time; and the ſituation of the boroughs being referred to Sir Dudley Ryder, Lord Preſtongrange, and Mr. Murray, they reported, that they were *ipſo facto* reduced, and could only be reſtored by the King's warrant.

COUNSEL for the ſitting member.

The ſetts, as tranſmitted to the convention in 1709, were nothing but a ſort of hiſtory of the uſual mode of election in the different boroughs, ſuch as practice had introduced, and, being produced merely by uſage, they may be repealed by ſubſequent uſage. It would be ſtrange if this were not ſo, in a country where a continued deviation for a length of time can repeal even an act of Parliament.

But, in the preſent caſe, the terms of the ſett have not been departed from. "*Thereafter*" does not neceſſarily mean "*on a ſubſequent part of the ſame day*;" and the word "*ordinarily*" certainly is not ſynonimous to "*always*".

If the ſenſe of the word "*thereafter*" is doubtful, it muſt be explained by the practice in the borough, and it has been proved that the practice is to purge the council ſome days after the election of magiſtrates.

On the 29th of September every one of thoſe were in the council who were to continue ſo during the year, and made part of the 40 who compoſe what is called the long council.

If

(1) Vide ſupra, p. 20.

If there had been no purging till the election of the delegate, all the 40 might have voted at that election (2). The purging is not considered, in any borough, as an essential part of the election. In some boroughs weeks intervene between the election of magistrates and the purging. In some, the right of purging is annexed to some estate in the neighbourhood. Can it be supposed that the neglect of the proprietor of such an estate to purge the council would vitiate the whole election, and dissolve the corporation?

The cases which happened in the time of the rebellion do not apply. In those cases, the year was elapsed, and, the annual magistrates being gone, there was no body in the borough entitled to make the new election; but, in the present instance, the new council and magistrates had been elected within the year, so that there were persons existing competent to purge the council.

Suppose the purging, in the present case, to have been void, that cannot affect the election of the magistrates, for that was completed within the time specified in the sett. The utmost the court of session would do, in such a case, would be to make a partial reduction of the counsellors illegally chosen. Thus, in the case of Brechin, which happened last year, the election of five deacons was set aside as illegal, but that of the other magistrates continued in force.

When the sett of a borough has been departed from, and the election complained of on that ground, the court of session has refused to reduce the election, and has directed the complaint to be changed to an action of declarator, by which the mode prescribed by the sett might be declared and restored (3).

What is contended for, on the part of the petitioners, would put it in the power of seven persons, who in this borough have the right of purging the council, to avoid the election of all the other members, and thereby reduce the borough, by agreeing among themselves not to exercise their right, within the time beyond which it is said that it cannot be legally exercised.

If the election of all the magistrates and counsellors had been void, yet, while they were *de facto* possessed of their offices, their election of a delegate is void, for, by the law of

(2) *Quære.* (3) *Quære.*

of Scotland, the acts of a magiſtrate are good, while he is in his office, although his election may afterwards be determined to have been illegal. This is laid down in Macdowal's Inſtitutes, vol. i. p. 406. It was ſo in the civil law, on which the Scotch law is in a great meaſure founded (C).

The counſel for the petitioners, in reply, ſtill inſiſted, That the ſett of a borough is ſo binding, that the departure from it, in any circumſtances, avoids the whole election, and they cited the caſe of this very borough of Jedburgh in the Houſe of Lords, 14 April, 1738, to prove that doctrine; the Marquis of Lothian, and others, appellants, againſt John Haſwell, and others, reſpondents (4).

They denied that the acts of *de facto* magiſtrates, unleſs they be merely miniſterial, are good, which they ſaid the election of a delegate is not. They ſaid, that the word "*ordinarily*' in the ſett was uſed in the ſenſe of "*cuſtomari-*"*ly*", *i. e.* according to the cuſtom of the place.

☞ The counſel for the ſitting member denied that the caſe of Jedburgh in 1738 authorized the inference drawn from it, or that it could apply in any reſpect to the preſent cauſe.

On Monday, the 8th of May, the Committee, by their Chairman, informed the Houſe, that they had determined, That the ſitting member was duly elected (5).

(4) *Quære.* (5) Votes, p. 640.

NOTES

NOTES

ON THE CASE OF

NORTH BERWICK, &c.

PAGE 208 (A). The perſon who drew theſe petitions ſeems not to have been aware that any diſtinction had ever been taken, between offices which diſqualify from *ſitting in Parliament*, and thoſe which diſqualify from *being elected*. *Vide ſupra*, Caſe of Milborne Port, vol. i. p. 72. Note (H).

P. 217 (B). By the ſtatute of 20 Geo. II. cap. 43. all ſheriffſhips, and ſtewartries, of diſtricts, being parts only of ſhires or counties, were extinguiſhed; and their juriſdictions veſted in the court of ſeſſion, § 1. § 3. All other ſheriffſhips and ſtewartries, not extinguiſhed, and poſſeſſed by ſubjects in inheritance or for life, were reſumed, and annexed to the Crown, § 4. And it was enacted that the King ſhould not grant thoſe offices to any perſon for a longer term than a year, § 5. All high ſheriffs and ſtewards were rendered incapable of acting as *judges* within their ſhires or ſtewartries, § 30. By this means thoſe offices became merely nominal; and, although the King ſtill has the power of granting them for the term of a year, I believe, ſince the ſtatute paſſed, no high ſheriff or ſteward has been appointed in Scotland. The King is, as it were, high ſheriff and ſteward of each ſhire and ſtewartry, and the judicial and miniſterial functions are performed by the depute and ſubſtitute.

P. 220. (C). Macdowal, in the paſſage referred to, quotes no authority but Viner and Juſtinian, and ſeems only to mean to ſtate what the law of England and the civil law hold, concerning the acts of officers *de facto*.

INDEX

INDEX

TO THE

SECOND VOLUME.

A.

ABERBROTHICK, &c. caſe of, in 1748, 183, 184.

Abercromby, Ralph, Eſq. ſitting member in the caſe of Clackmannan, 167. Determined to be duly elected, 174.

Alms, 38, 39, 50, 52 to 54, 58, 59, 61, 63, 161, 162, 164.

Ayleſbury, caſe of, in 1696 and 1699, 52.

B.

Banbury, caſe of, 19.

Bedford, CASE of, 34 to 63. Laſt determination of the right of election there, 36. Reſolutions of the Committee explanatory thereof, 45, 61.

Bedford's charity, ſee *Charity*.

Bewdley, caſe of, 11, 16, 17.

Blake, Sir Patrick, petitioner in the caſe of Sudbury, 64. Determined to be duly elected, 86.

Boroughs in Scotland, liſt of, according to the order of their preſidency, 104 to 106. Delegates for, *vide Delegates*.

Boſton, caſe of, in 1628. 122, 142.

Bribery, 68, 82, 83, 85, 195 to 206.

Bridport, caſe of, in 1628. 125. In 1762. 142, 143.

Burgeſs, queſtion if neceſſary to be one in order to repreſent a diſtrict of Scotch boroughs, 97, 98, 100 to 103. Held not to be neceſſary, 103, 104.

Burgeſs, or *Burgenſis*, ſenſe of the word in charters and returns, 114.

Burgeſſes, *non-reſident*, queſtion whether they may vote in Bedford, 36 to 41. Determined that they may, 45. *Honorary*, queſtion if there can be ſuch in Bedford, 41, 44. Held that there may, 45, 46. Petition to the Houſe of Commons againſt the creation of them there, 62. Queſtion whether they can vote in Sudbury, 68, 73. Have no corporate rights in Scotch boroughs, 100.

Burke, William, Eſq. petitioner in the caſe of Haſlemere, 155. Determined not duly elected, 166.

Burrell,

Burrell, Sir Merrick, one of the ſitting members in the caſe of Haſlemere, 155. Determined to be duly elected, 166.
Bye-money, charity ſo called in Cirenceſter, does not diſqualify, 164.

C.

Campbell, Daniel, Eſq. petitioner in the caſe of Lanerk, 179. Determined not duly elected, 189.
Carmarthen, Marquis of, one of the ſitting members in the caſe of Helleſton, 1. Determined not duly elected, 25. Caſe of, in 1770. 21, 24, 33.
Certificate men, not diſqualified, 54, 55.
Charity, Harpur's, in Bedford, nature of, 46 to 48. Queſtion whether it diſqualifies, 46 to 54. Determined that it does not, 54. *Bedford's*, in Ayleſbury, diſqualifies, 52. Nature of, 63. *Kendrick's*, in Reading, diſqualifies, if received within two years, 52. *Hawes's*, in Bedford, nature of, 56. Does not diſqualify, 61. *Welborn's*, in Bedford, nature of, 56. Does diſqualify, 61. *Smith's*, in Surrey, queſtion if it diſqualifies, 162, 164. *Vide Bye-money*.
Charter of Helleſton, of 27 Eliz. and 16 Car. I. 357. New one in 1774, 6, 7. Report of the Attorney and Sollicitor General concerning, 28. Return under the old charter determined to be the legal return, 25, 26.
Cheſter, caſe of, in 1747-8. 74. Laſt determination of the right of election there, 74.
Chippenham, caſe of, in 1692. 203, 204.
Cirenceſter, caſe of, in 1624. 114. In 1690. 164.
Clackmannan county, Case of, 167, 178.
Clerk of the Pipe, in Scotland, not diſqualified from being elected or ſitting in Parliament, 20.
Colcheſter, caſe of the mayor and commonalty of, *v.* Seaber, 12. The King againſt the mayor and aldermen of, in 1774. 18, 29, 32, 122, 141. Caſe of, in 1628. 13, 18, 22, 29.
Committee for Haſlemere, adjourns during the Eaſter holydays on application to, and leave from, the Houſe, 166.
Commonalty, or *Communitas*, ſenſe of the word in charters and returns, 126, 135, 138, 140, 144.
Coote, Sir Eyre, one of the ſitting members in the caſe of Poole, 110. Determined to be duly elected, 140.
Corporation, what, 15. Queſtion if diſſolved by the loſs of an integral part, 10, 13, 14, 18, 19, 21, 23, 24, 32, 33.
Corporators, how, and what, different acts and privileges are done or enjoyed by, 29.
Coventry, reſolution concerning the right of election there, 49.
Creſpigny, Philip Champion, Eſq. one of the ſitting members in the caſe of Sudbury, 64. Determined not duly elected, 86.

D.

Daſhwood, Henry Watkin, Eſq. petitioner in the caſe of Wigtown, 88. Determined to be duly elected, 103.
Delegates for Scotch boroughs, method of electing them, 91 to 106. Their powers, 93. Queſtion whether a delegate can reſign and another be choſen in his place, 94, 97, 98, 100 to to 103.
Demiſſion, ſee *Reſignation*.
Deſuetude, 101, 108.
Diſqualification, by offices of profit under the Crown created ſince 25 Oct. 1705, 180.
Drummond, Adam, Eſq. one of the ſitting members in the caſe of St. Ives, 190. Determined to be duly elected, 194.
Durham, caſe of, 12, 18.

E.

Edinburgh, caſe of, in 1711. 102, 103.
Election for counties, to be holden at the place where uſual for 40 years paſt, 95. Queſtion concerning the common law right of, in boroughs, 114, 135. See *Poll-election*.
Erſkine, James Francis, Eſq. petitioner in the caſe of Clackmannan, 167. Determined not duly elected, 174.
Evidence, queſtions of, 79, 80, 84, 116, 117, 133, 134, 150, 151, 154, 184, 187, 194.
Exchequer, court of, in Scotland, conſtitution of, before the union, 212, 218. Article in the treaty of union concerning, 215.
Extent, old, in Scotland, what, 175.

F.

Fonnereau, Thomas, Eſq. one of the ſitting members in the caſe of Sudbury, 64. Determined not duly elected, 86.
Fox, Hon. Charles James, petitioner in the caſe of Poole, 110. Determined not duly elected, 140.

G.

Gilmour, Sir Alexander, petitioner in the caſe of North Berwick, 207. Determined not duly elected, 233.

H.

Haddington, &c. caſe of, in 1771. 96, 97, 99, 100, 106, 107,
Hanmer, Sir Walden, petitioner in the caſe of Sudbury, 64. Determined to be duly elected, 86.
Haſlemere, Case of, 155 to 166. Laſt determination of the right of election there, 157. Reſolution explanatory thereof, 157.
Helleſton, Case of, 1 to 33. Right of election there, 2.
Heniton, caſe of, in 1715. 175.
Honorary, ſee *Burgeſſes*.
Hoſpital, St. John's, brethren of in Bedford, not diſqualified, 61.

Howard, John, Esq. petitioner in the case of Bedford, 34. Determined not duly elected, 61.

I.

Jedburgh, &c. See *North Berwick*, *Haddington*.

Inhabitants. Question whether they can be corporators, 120, to 135, 136, 138, 139, 145, 146. *Inhabitants householders* resolution of the House declaring the common law right of election to be in them, 114.

K.

Kelly, Henry, Esq. petitioner in the case of Haslemere, 155. Determined not duly elected, 166.

King, the, v. Pitt, 196.

L.

Lanerk, county, Case of, 179 to 189.

London, alms if received within two years disqualifies there, 52.

Longe, Thomas, case of, for bribery, in 1571. 197.

Ludlow, case of, in 1690. 18.

M.

Maidstone, case of, in 1742. 20, 21.

Mauger, Joshua, Esq. one of the sitting members in the case of Poole, 110. Determined to be duly elected, 140.

Maitland, Hon. John, sitting member in the case of North Berwick, 207. Determined to be duly elected, 230.

Miller, baron of the Exchequer in Scotland, his case in 1727. 218, 220.

Minehead, case of, in 1728. 169.

Molyneux, Thomas More, Esq. one of the sitting members in the case of Haslemere, 155. Determined to be duly elected, 166.

Mortimer, Hans Wintrop, Esq. petitioner in the case of Shaftesbury, 147. Determined to be duly elected, 151.

N.

North Berwick, &c. Case of, 207 to 231.

Norton, William, Esq. sitting member in the case of Wigtown, 88. Determined not duly elected, 103.

Norwich, case of, in 1705. 87.

O.

Oath against bribery to be taken at elections, 205.

Occasional freemen, 9, 22, 24, 44, 45, 165, 166.

Old extent. See *Extent*.

Order. See *Standing Order*.

Owen, Francis, Esq. one of the sitting members in the case of Helleston, 1. Determined not duly elected, 25.

P.

Paterson and others, case of, against *Alexander* and others, 205.

Pembrokeshire, case of, 95, 106, 107.

Pipe, clerk of, see *Clerk*.

Plympton, caſe of, in 1690. 11, 12, 17, 21.
Poll-election, in Scotch boroughs, 100, 108.
Poole, CASE of, 110 to 146. Queſtion concerning the right of election there, 112. Determination of the Committee of elections in 1689, on that ſubject, 112. Diſagreed to by the Houſe, 113. Queſtion whether ſuch diſagreement amounts to a determination of the contrary, 113, 114, 123 to 132. Caſe of Poole in 1661. 133, 135, 143, 144, 145.
Praed, William, Eſq. one of the ſitting members in the caſe of St. Ives, 190. Determined not duly elected. 194.
Preſidency, order of, in diſtricts of Scotch boroughs, 91, 99.

Q.

Qualification of members for counties, 98. for boroughs, *ibid.* None neceſſary in members for the univerſities, 101. Origin and nature of the qualification of the electors and elected for counties in Scotland, 170, 171.
Quo warranto, informations in the nature of. Rule of the King's Bench, concerning them, 4, 15, 16.

R.

Rateability, and *Rates*, 192, 193.
Reading, caſe of, in 1708. 52.
Reeve. v. Longe, obſervation on the caſe of, 107, 108.
Report, ſpecial, concerning Shafteſbury, 152, 153.
Reſignation of a diſqualifying office, queſtion concerning, 188, 189.
Reſolution, annual, againſt bribery, 209.
Returning officer of Sudbury reprimanded by the Committee, 84, 85. Of Norwich, caſe of, in 1705. 87. who, for a diſtrict of Scotch boroughs, 93.
Returns, ſingle. Form of the order for amending them, 25.
Rumbold, Thomas, Eſq. one of the ſitting members in the caſe of Shafteſbury, 147. Determined not duly elected, 151.

S.

Saltaſh, CASE of, in 1739. 216, 217.
Saint Ives, CASE of, 191 to 206. Laſt determination of the right of election there, 191.
Sett of a royal borough in Scotland, what, 224, 225.
—— of Jedburgh. 225.
Shafteſbury, CASE of, 147 to 154. Laſt determination of the right of election there, 148. Special report of the Committee concerning bribery there, 152, 153. Proceedings in the Houſe thereupon, 152, 153.
Sheriff Deputes, in Scotland, diſqualified, 217.
Sheriffdoms and *Stewartries*, in Scotland, 231.
Sparrow, Robert, Eſq. one of the ſitting members in the caſe of Bedford, 34. Determined not duly elected, 63.

Stamps,

Stamps, enrollment upon, in corporation books, queſtion, whether neceſſary evidence of freedom in a borough, 75 to 83. 85, 86.
Standing Orders of 22 Nov. 1717. 168, 170. of 21 Oct. 1678. againſt bribery, 198, 199.
Statutes, *Directory* or *Mandatory*, 94, 106, 108.
——— cited in this volume.
1 Hen. V. cap. 1. 100.
7 Par. Jac. I. of Scotl. cap. 101. 170.
11 Parl. Jac. VI. of Scotl. cap. 114. 170.
1 Parl. Car. II. in Scotl. cap. 35. 170.
3 Parl. Car. II. in Scotl. cap. 2. 171.
5 Will. and Mar. cap. 21. 76.
7 Will. III. cap. 4. 198, 199.
7 and 8 Will. III. cap. 25. § 3. 95, 160. § 7. 162, 163.
8 and 9 Will. III. cap. 23. § 12. 77.
9 and 10 Will. III. cap. 25. 77.
10 and 11 Will. III. cap. 16. 108.
12 and 13 Will. III. cap. 2. 212.
4 Anne, cap. 8. 212.
Sc. Act. 5 Feb. 1707-8. 90, 91.
6 Anne, cap. 6. § 5. 91, 101.
6 Anne, cap. 7. § 25. 180, 188.
6 Anne, cap. 26. 210, 211.
9 Anne, cap. 5. § 1. 98, 170.
9 Anne, cap. 20. § 6. 2, 3.
10 Anne, cap. 23. 162.
11 Geo. I. cap. 4. 20, 33, 99.
2 Geo. II. cap. 24. § 1. 199.
7 Geo. II. cap. 16. § 5. 92, 94. § 7. 222.
9 Geo. II. cap. 38. 201.
16 Geo. II. cap. 11. § 28. 92. § 30. 93, 96. § 10. 171. § 4. 172, 177. § 24. 172, 173, 201.
20 Geo. II. cap. 43. 216, 128, 129.
21 Geo. II. cap. 19. § 11. 217.
3 Geo. III. cap. 15. § 1. 9, 13, 14, 22, 24, 44, 45.
5 Geo. III. cap. 46. § 1, 2. 77, 79.
10 Geo. III. cap. 41. 153.
14 Geo. III. cap. 58. 100.
14 Geo. III. cap. 81. §. 2. 99. § 1. 107 172.
15 Geo. III. cap. 36. 153, 154.
Stephens, Samuel, Eſq. petitioner in the caſe of St. Ives, 190. Determined not duly elected, 194.
Stockbridge, caſe of, in 1689. 198.
Stuart, Andrew, Eſq. ſitting member in the caſe of Lanerk, 179, Determined to be duly elected, 189.

Sudbury, Caſe of, 64 to 87. Laſt determination of the right of election there, 65. Caſe of in 1702, and in 1703. 66, 67.
Sulſton, *v.* Norton, Caſe of, 204.
Superiority, in Scotland, what, 175.
Sykes, Francis, Eſq. one of the ſitting members in the caſe of Shafteſbury, 147. Determined not duly elected, 152.

T.

Thetford, caſe of, in 1699. 202.
Tiverton, caſe of, 19, 20, 24. Report of Sir Philip Yorke, and Sir Clement Wearg, concerning, 32, 33.
Treating. See the Caſe of *Thetford*.

U

Univerſity, members for, termed *burgeſſes*, 101, 108. See *Qualification*.

V.

Valued Rent in Scotland, what, 175, 176.

W.

Wake, Sir William, one of the ſitting members in the caſe of Bedford, 34. Determined to be duly elected, 61
Wallingford, laſt determination of the right of election there, 38
Warwick, caſe of, in 1628. 125, 145. In 1723. 144.
Weſtbury, mayor of, his caſe for bribery, in 1571. 197, 198
Weymouth and *Melcombe Regis*, reſolution of 1714, concerning the right of election there, 160. Obſervations upon it, 163.
Wheatly, Thomas, his gift not a diſqualification in Coventry, 49.
Whitbread, Samuel, Eſq. petitioner in the caſe of Bedford, 34. Determined to be duly elected, 61.
Whitchurch, laſt determination of the right of election there, 160, Obſervation upon it, 163.
White, Sir Thomas, his gift not a diſqualification in Coventry, 49.
Wigtown, &c. Caſe of, 89 to 109.
Willes, *v.* Harris, caſe of, at the aſſizes in Cornwall, in 1774. 133, 134, 145.
Williams, John, petitioner in the caſe of Poole, 110. Determined not duly elected, 140.
Worceſter, caſe of, in 1737-8. 74, 75. Laſt determination of the right of election there, 75.

Y

Yorke, Philip, Eſq. petitioner in the caſe of Helleſton, 1. Determined to be duly elected, 25.
Young, and others, *v.* Johnſon and others, caſe of, 173.

End of the SECOND VOLUME.